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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. ~~1626~~. 1169

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, PLANTIFF IN ERROR,

vs.

THE COMMERCIAL UNION INSURANCE COMPANY ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED MAY 13, 1890.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judge of the circuit court of the United States for the eastern district of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The Commercial Union Insurance Company *et als.*, plaintiff-, and St. Louis, Iron Mountain and Southern Railway Company, defendant, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 5th day of April, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fourteenth.

The Seal of the Circuit Court, Western Division of East. Dist. Ark., U. S. A.

RALPH L. GOODRICH,
Clerk of the Circuit Court of the United States of America for the Western Division, Eastern District of Arkansas.

Allowed by—
HENRY C. CALDWELL, *Judge*,
By W. P. FEILD, *D. C.*

2 The execution of the foregoing writ of error appears from the schedule hereto annexed.

3 Be it remembered that on the 21st day of September, 1889, came into the office of the clerk of the circuit court of the United States for the western division of the eastern district of Arkansas the Commercial Union Insurance Company, by U. M. & G. B. Rose and Eben W. Kimball, Esqrs., its attorneys, and filed therein its complaint against the St. Louis, Iron Mountain and

Southern Railway Company; which is in the words and figures following, to wit:

In the United States Circuit Court for the Eastern District of Arkansas.

THE COMMERCIAL UNION COMPANY, THE SUN MUTUAL INSURANCE COMPANY, *et al.*
v.
THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

4 The Commercial Union Insurance Company, which is a corporation created by the laws of England; The Sun Mutual Insurance Company, which is a corporation created by the laws of the State of Louisiana, and The Insurance Company of North America, which is a corporation created by the laws of the State of Pennsylvania, brings this suit against The St. Louis, Iron Mountain and Southern Railway Company, which is a corporation created by the laws of the State of Arkansas, and for cause of action they say that prior to the 20th day of September, 1887, the Union Compress Company was engaged in compressing bales of cotton for transportation; that their compress was situated in the town of Argenta, on the north side of the Arkansas river, opposite the city of Little Rock, in said district; that the defendant was a common carrier, using and operating a railway running from the city of Little Rock, over
5 a bridge that was owned or used by it, to Argenta; that prior to that time said defendant had agreed with said compress company, in consideration of a certain sum of money to be paid to it by said compress company for each and every car-load of cotton to be transported by it under said agreement, that the said defendant would receive all the cotton in bales that might be brought to the sheds of said compress company in said city, and that it would transport the same from thence to said compress in Argenta, a distance of about a mile and a half; that said sheds referred to in said contract were wooden sheds, built at the intersection of Main and Water streets, in said city, each of said streets being forty feet wide and crossing each other at right angles, Main street run-
6 ning north and south and Water street running east and west, both of said streets being public thoroughfares perpetually dedicated to public use; that immediately in front of said sheds, on Water street, there was a main railway track of said defendant on which cars were propelled in transporting said cotton to said compress under said contract, and which was also much used for other purposes; that immediately in front of said sheds and connected therewith was a platform between said sheds and said railway track which was habitually used for the purpose of loading said cotton on said cars for transportation as aforesaid; that at the time that the cotton hereinafter particularly mentioned was deposited in said sheds the said contract had been habitually acted on by the parties thereto for a long period of time;

that for the purpose of realizing and increasing the compensation thus agreed upon said defendants made the said
7 sheds a receiving station of its road for all cotton in common or uncompressed bales that might be delivered there, and gave bills of lading for the same to all persons depositing cotton in said sheds and applying therefor to any point in the United States or Europe to which it might be consigned, reserving in said bills of lading the privilege of having the same compressed; that while said contract was in full force Sam. O. Smith placed in said sheds 340 bales of uncompressed cotton in the care and custody of said compress company, with a view to its future compression and shipment, in accordance with the terms of said agreement, which had been so long acted on as to become a custom well known to all persons engaged in handling and shipping cotton in Little Rock, the said 340 bales being then and there of the value of seven-
8 teen thousand dollars; and that while it was thus deposited the plaintiffs issued each for itself a policy of insurance on it in favor of the said compress company for the use and benefit of said compress company and the owner thereof, each of said plaintiffs insuring them against any loss that they or either of them might sustain by reason of damage or destruction thereof by fire, for a period extending beyond the time that said cotton was actually destroyed, as will be hereinafter set forth, said policies covering the entire value of said cotton; that under said agreement and custom, by virtue of which cotton was habitually received at said sheds, very large quantities of it were annually deposited at said sheds for compression and transportation by many owners; that said sheds were not sufficiently large to hold all the
9 cotton that was annually brought there for said purpose in the months of October and November beyond more than two or three days, there being no need for any additional space in case said defendant should expeditiously remove said cotton as it was received, as it was required by its said contract and its obligations to the public to do, said sheds not having been designed for the keeping of cotton for any great length of time or in large quantities, but only being intended in the main for the temporary protection of cotton until such short time as would suffice for its removal to said compress, said sheds being made of wood and placed within a few feet of said railway track, on which the engines of said defendant were passing at all hours of the day and night, the said sheds being also open in front looking towards Water street,
10 so that cotton deposited there was considerably exposed to the risk of damage or destruction by fire occasioned by sparks emitted from passing engines and from other causes; that in the months of October and November, 1887, said defendant did not remove the cotton that was received at said sheds within a reasonable time, as it was required to do by its said contract and by the custom which had grown up thereunder, but suffered it unreasonably to accumulate at said sheds from time to time during said period, and that although during that time the defendant was often requested by said compress company to remove it from said sheds,

where it was exposed to special hazard, which was daily increasing from fresh accumulations, the weather being at the time unusually dry, said defendant neglected and refused so to do,

11 and though large quantities of cotton were daily received at said sheds from the 20th day of October until the 14th day of November, 1887, the defendant did not during that time remove a single bale of said cotton from said sheds; that in the meantime said sheds became filled with said cotton to overflowing, and, there being no other place where additional receipts could be stored, large quantities of cotton bales were placed on Main street adjoining said sheds, and that at that time there were buildings at the intersection of said streets on both sides thereof, one of them on the south side of Water street and the west side of Main street and adjoining both streets, forming the said cotton sheds of the said compress company, the same being contiguous to both of said streets; that by reason of the reception of said cotton by said

12 defendant at that place and its failure to remove it, *having* by reason of its invitation to the public to deliver cotton for shipment at that place on the faith that it would be removed within a reasonable time, cotton in bales continued to be delivered there and to be received by defendant, which continued to give out bills of lading therefor until it encroached on said adjoining streets, and for more than two weeks, with the knowledge and consent of defendant, it was piled clear across Main street from side to side from eight to ten feet high, leaving only a passage for foot passengers about four feet wide, all the rest of said street being rendered impassable by said cotton, of which cotton about 4,000 bales were covered with bills of lading issued by said defendant and which had been long previously received by it, and that said cotton had thus

13 remained on said street for almost three weeks before the loss hereinafter to be mentioned, and much of it for a still longer period of time, the same constituting a public nuisance, infringing on the rights of the public to the free and unimpeded use of said street and endangering the cotton of said Smith, deposited as aforesaid, as well as much other valuable property in the vicinity, and indirectly a large part of the most valuable public and private buildings in said city, and that while said defendant was thus continuing said public nuisance, which was made a criminal offence by an ordinance of said city, to which attention had been but recently called by the mayor thereof in a public proclamation, and when there were about 4,000 bales of said cotton thus heaped in said sheds and in said street which defendant should long previously have removed, said cotton was fired in said street by some one to the

14 plaintiff unknown, either wilfully or negligently, but most likely through negligence, as persons were continually traversing said street and going between said bales of cotton smoking pipes, cigars, and cigarettes, and said fire first originated at or near said narrow passage on Main street, between said bales of cotton, and in broad daylight; that by reason of said fire the said cotton was totally destroyed, within the risk insured against in said policies, the total value thereof being covered by the same, and that there-

upon said Smith afterwards made proof of said loss of said cotton, upon which the plaintiffs paid him the full amount thereof, each of the plaintiffs paying its lawful *pro rata* of said loss.

II. And for a different statement of the same cause of action said plaintiff says that prior to the 14th day of November,
15 1887, Sam. O. Smith had deposited in the sheds of the Union Compress Company, in the city of Little Rock, 340 bales of cotton of the value of seventeen thousand dollars, and that while they were thus deposited plaintiff, on the application of said Smith, insured them against loss by fire for their full value; that from the 20th day of October until the 14th day of November, 1887, said defendant and the said Union Compress Company, by their joint act, caused many other bales of cotton to be piled in the public street of said city adjoining said cotton sheds, so as to greatly obstruct the public use of said street, and so created a public nuisance, which was continued for three weeks or more, until the said 14th day of November, 1887, when said cotton in said street was fired, accidentally or otherwise, by some person unknown to the
16 plaintiffs, and that said fire was communicated to said shed and destroyed the same, together with said cotton of said Smith deposited therein, and that as said loss of said cotton was within the risk of said policy said Smith proved up his said loss and the plaintiffs paid him the same, amounting to seventeen thousand dollars, on the — day of January, 1888.

Wherefore plaintiffs pray that they may have judgment against said defendant for said sum of money so paid by them as aforesaid, with interest and costs.

E. W. KIMBALL.
U. M. & G. B. ROSE.

We undertake for costs, as usual.
Sept. 13, 1889.

U. M. & G. B. ROSE.

Filed and writ issued.
Sept. 21, 1889.

RALPH L. GOODRICH, *Clerk.*

17 United States of America, Western Division of the Eastern District of Arkansas.

Be it remembered that at a circuit court of the United States of America in and for the western division of the eastern district of Arkansas, begun and holden on Monday, the 28th day of October, anno Domini one thousand eight hundred and eighty-nine, at the United States court-room, in the city of Little Rock, Arkansas, the Honoroble Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit:

On October 30, 1889, comes the defendant, by Dodge & Johnson and John M. Moore, Esqrs., its attorneys, and files herein its motion to make the complaint more specific.

(For motion see bill of exceptions.)

And on October 31, 1889, as follows:

Comes the plaintiff, by U. M. & G. B. Rose and E. W. Kim-
18 ball, Esqrs., its attorneys, and comes the defendant, by Dodge & Johnson and John M. Moore, Esqrs., its attorneys, and the defendant's motions to make the complaint more specific and to file exhibit are heard, argued, and submitted to the court, and the court, being now well and sufficiently advised in the premises, considers that said motions be overruled; to which ruling of the court the defendant excepts.

And on November 1, 1889, as follows:

Comes the defendant, by Dodge and Johnson and John M. Moore, Esqrs., its attorneys, and files herein its demurrer to the complaint, and also its plea of non-joinder.

(For demurrer & plea of non-joinder see bill of exceptions.)

19 And on November 4, 1889, as follows:

Comes the defendant, by Dodge and Johnson and John M. Moore, Esqrs., its attorneys, and files herein its demurrer to the complaint.

(For demurrer see bill of exceptions.)

And on January 27, 1890, as follows:

Come the plaintiffs, by U. M. & G. B. Rose, Esqrs., and E. W. Kimball, Esqrs., their attorneys, and comes the defendant, by Dodge & Johnson and John M. Moore, Esqrs., its attorneys, and the parties proceed to the argument of the demurrer to the complaint, the plea of non-joinder, and the motion to make the complaint more specific, and the argument not being concluded, the same is continued.

20 And on January 30, 1890, as follows:

Come the plaintiffs, by U. M. & G. B. Rose and E. W. Kimball, Esqrs., their attorneys, and comes the defendant, by Dodge & Johnson and John M. Moore, Esqrs., its attorneys, and the court, having heard all the argument of counsel and being now well and sufficiently advised in the premises, considers that the demurrer to the complaint, the plea of non-joinder of proper parties, and the motion to make the complaint more specific be overruled; to which ruling of the court the defendant now excepts.

And on February 3, 1890, as follows:

Comes the defendant, by Dodge & Johnson, Esqrs., its at-
21–22 torneys, and files herein its answer to the complaint; which answer is as follows:

United States Circuit Court for the Eastern District of Arkansas.

COMMERCIAL UNION INSURANCE COMPANY
vs.
ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY. } 4723.

Answer to Complaint.

I.

For answer to one paragraph of plaintiff's complaint defendant says:

It admits that prior to September 20, 1887, the Union Compress Company was engaged in compressing cotton for transportation at Little Rock, Arkansas. It denies that its only compress was situated at the town of Argenta, Arkansas, but says that said Union Compress Company had its compress buildings located for many years at the foot of Main street, in the city of Little Rock,
23 Arkansas, and had been engaged up to within a short period prior to the said 20th day of September, 1887, in compressing cotton at said foot of Main street, and at the date above referred to was receiving cotton at said point in its compress building, warehouses, and sheds for the purpose of compressing the same.

It says further that the said Union Compress Company on said date was erecting a new compress in the eastern portion of the city of Little Rock, which at that time was not quite ready to receive cotton for compression. It admits that its line of railroad ran alongside of the said compress and warehouses belonging to the said Union Compress Company, situated in the city of Little Rock and at the foot of Main street; but it denies that it ever made any contract with the said Union Compress Company by which it agreed or held out any inducement to the said compress company or the public to receive cotton at its compress and warehouses at
24 the foot of Main street, in the city of Little Rock, or anywhere else; but it says it gave the Union Compress Company a certain rate per car-load, whereby it agreed to haul all of the cotton of the said compress company from its compress and warehouses and sheds at the foot of Main street and elsewhere in the city of Little Rock to its compress in Argenta whenever it should desire to transfer cotton from one place to the other.

Defendant says that for many years a compress and warehouses has been erected at the foot of Main street, in the city of Little Rock, by individual enterprise; that the said compress and warehouses were built alongside of its tracks long after said tracks were constructed and in operation, but it denies that it had any part in the erection or control of the said compress buildings, warehouses, or sheds at the foot of Main street, either before or at the
25 time of the fire referred to in the complaint, and it denies that, for the purpose of realizing more and increasing the profits by hauling cotton from the said foot of Main street, it made the said Union Compress Company buildings and warehouses or

sheds a receiving station of its road for all cotton in common or uncompressed bales that might be delivered there or for any other purpose; it denies that it had or ever had any interest or claim to or control over the said warehouses, sheds, or buildings belonging to said Union Compress Company or the ground upon which they were located at the foot of Main street, in the said city of Little Rock, as aforesaid; it denies that it ever received any cotton from the foot of Main street from any person or persons whomsoever; it denies that it ever made said point a depot or receiving station for cotton belonging to any person or persons whomsoever, or that it had any right, power, or authority so to do, but it says
26 that the said property belonged entirely and exclusively to the said Union Compress Company, in which this defendant had no interest whatever and over which it had no control. It says that the said Union Compress Company, for its convenience, did receive cotton at said point for compression and storage and done so for many years and long prior to the 14th day of November, 1887, both as warehouseman and for the purpose of compression; that upon receipt of such cotton it issued its warehouse receipt to the owners thereof; that the various railway companies doing business at the city of Little Rock would, at the request of the holders of said warehouse receipts for cotton so stored with said Union Compress Company for compression, whether the same were stored at the foot of Main street or at other points in the city of Little Rock or Argenta, take up the aforesaid receipts of the compress
27 company and issue bills of lading to the shippers, thereby becoming the bailors of the said compress company, by whom said cotton continued to be held for compression, and it was well understood by the shippers of said cotton, upon the issuing to them of bills of lading as aforesaid, that the cotton was to remain in the possession and custody of the compress company until it should be compressed and prepared for shipment, and was not to be taken possession of by the railway company for transportation until it has been compressed by said Union Compress Company.

Defendant denies that at the time of said fire there were 4,000 bales of cotton in said sheds for which it had issued bills of lading, or that it had ever received any of the cotton that was stored in said sheds, or that it had any control whatever over the same.
28 It denies that it ever held out any inducement to the owners or shippers of cotton to deliver the same at that point; it denies that this defendant ever suffered or permitted a large amount of cotton to unreasonably accumulate at the sheds of the said Union Compress Company, or that it unreasonably neglected or refused to move said cotton, or that it had any control over the same in any manner whatsoever.

That as to whether or not Sam. O. Smith had 340 bales of cotton in the Union Compress Company's sheds and warehouses at the foot of Main street, in said city of Little Rock, at the time of the fire this defendant knows nothing and has no information upon which to found a belief, and therefore denies the same; that as to

the value of said cotton it knows nothing, and therefore de-
29 nies that it was of the value of $17,000; that as to whether or not the plaintiff in this suit ever issued a policy of insurance covering said cotton in favor of the said Sam. O. Smith, for the use of itself and the owners thereof, insuring them against any loss that they might sustain by reason of fire, or as to whether it has paid anything thereon to the said Sam. O. Smith, this defendant knows nothing, and has no information upon which to found a belief, and therefore denies the same; that this defendant denies that it had any control of any kind or character over the said Union Compress Company, or that it had any power to prevent their receiving cotton at the foot of Main street or at any other point. It denies that it was in any manner responsible for the accumulation of cotton at said point or that it was in any way responsible for the fire which destroyed the same. It denies that it had any
30 control over or interest in the manner of receiving, storing, caring for, and handling the said cotton stored in the sheds and warehouses of the said Union Compress Company at the foot of Main street at the time, and it says it had absolutely no control over the said sheds and warehouses or compress at the foot of Main street at the time said fire occurred or prior thereto.

II.

For answer to second of the complaint defendant says that as to whether or not Sam. O. Smith had deposited 340 bales of cotton, of the value of $17,000, in the sheds or warehouses of the Union Compress Company at the foot of Main street, in the city of Little Rock, or had said cotton insured by plaintiff against loss by fire on the 20th day of September, 1887, defendant has no knowledge or information upon which to found a belief, and therefore denies the same.

31 It denies emphatically that this defendant, either alone or jointly with the Union Compress Company, caused the said bales of cotton to be piled in the public streets of the said city of Little Rock, adjoining the said Union Compress Company's sheds and warehouses at the foot of Main street, or that it had any control over or interest in the said sheds, warehouses, or streets adjacent thereto; it denies that it took any part of any kind or character in the creation of any public nuisance in the streets of Little Rock, if any was created there, on the 14th day of November, 1887, or prior thereto.

III.

And for further answer to the first and second counts of said complaint defendant says: And defendant says that if the said cotton was destroyed by fire by reason of any careless acts of the
32 said Union Compress Company or others this defendant is in no manner responsible therefor.

But it says that if the said Sam. O. Smith stored their said cotton in the warehouses and sheds of the Union Compress Company at the

foot of Main street at the time alleged in said complaint they did so with a full and perfect knowledge that there was a large accumulation of cotton at said points and that the same was accumulating there faster than the said compress company could handle the same; that said plaintiff and said Sam. O. Smith were aware of the mode and manner in which said cotton was stored, cared for, guarded, and handled by the Union Compress Company, and the said S. O. Smith was at the time a stockholder and officer in said Union Compress Company, and the plaintiffs, knowing all said facts, insured said cotton in said Main street, and by their own acts in the premises contributed to the loss of said cotton, if any they
33 did loose.

Defendant specifically denies all the allegations of carelessness or negligence, either of omission or commission, on its part, as alleged and set up in the complaint, and says that it was guilty of no want of care in any respect whatever which would in any manner contribute to, approximately or otherwise, the cause of said fire on November 14, 1887.

III.

And for further answer defendant says that the said Sam. O. Smith, the assured, is a citizen of the same State as the defendant; that the property insured exceeded in value the sum alleged to have been paid by plaintiffs; that neither of the plaintiffs to this action have severally paid under the alleged contract of insurance a sum equal to two thousand dollars.

Wherefore defendant says this court has no jurisdiction of said action.

34 IV.

And for further and complete defense to the action in this suit defendant says:

That the plaintiff is a foreign corporation doing business in the State of Arkansas; that prior to the making and entering into the contract upon which this action is based the said plaintiffs wholly failed, refused, and neglected to comply with the conditions and provisions of an act of the General Assembly of Arkansas entitled "An act to prescribe the conditions upon which foreign corporations may do business in this State," approved April 4, 1887; that by reason of said refusal and neglect to comply with the said statutes of this State the contract upon which this action is based is void, and the courts are by law forbidden to enforce the same or any rights growing out of them in favor of said plaintiff. Wherefore defendant says that said plaintiff has no legal capacity to institute this suit.

J. M. MOORE.
DODGE & JOHNSON.

35 And on April 3, 1890, as follows:

THE COMMERCIAL UNION INSURANCE COMPANY, THE SUN MUTUAL Insurance Company, and The Insurance Company of North America
v.
THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

Now, on this day, came the said plaintiffs, by U. M. & G. B. Rose and E. W. Kimball, Esqrs., their attorneys, and also came the said defendant, by Dodge & Johnson & John M. Moore, Esqrs., its attorneys; and now come a jury, to wit, George W. Clark, J. H. Saunoner, J. Kellogg, E. D. Bradshaw, Thomas W. Newton, James Chappell, H. E. Erwin, S. Volener, W. M. Rose, J. M. Perci-
36 val, F. P. Cates, and A. Bates, making in all twelve good and lawful men, who, being duly sworn and empannelled, and having heard the testimony adduced and the argument of counsel and the instructions of the court, and having retired to consider, returned into court here the following verdict: We, the jury, find for the plaintiffs and assess them damages at the sum of eighteen thousand eight hundred and sixty-four and four-one-hundredths dollars.

It is therefore ordered, adjudged, and considered that the plaintiffs have and recover from and of the said defendant, St. Louis, Iron Mountain and Southern Railway Company, the said sum of eighteen thousand eight hundred and sixty-four dollars and
37 four cents (18,864.04), together with all their costs in and about this suit paid out and expended, and that they have execution therefor; and during the trial of said cause the said defendant took sundry exceptions to the ruling of the court, and to save said exceptions asked and obtained leave of said court to file its bill of exceptions at any time during the present term of the court.

And on April 5, 1890, as follows:

On this day come the plaintiffs, by U. M. and G. B. Rose and Eben W. Kimball, Esqrs., their attorneys, and the defendant, by Dodge and Johnson and John M. Moore, Esqs., its attorneys,
38 and the defendant files writs of error and citation in this cause, duly signed by the judge, and also a bond to operate as a supersedeas bond, and its bill of exceptions in this cause, duly signed and sealed by the judge.

39 Which bill of exceptions is in words and figures following, to wit:

In the United States Circuit Court for the Eastern District of Arkansas.

THE COMMERCIAL UNION INSURANCE CO. and Others
vs.
ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

Bill of Exceptions of Defendant.

Be it remembered that on the 30th day of October, 1889, the defendant filed its motion to compel plaintiffs to make their complaint more specific, and to file their polocies of insurance as exhibits, in words as follows:

Comes the defendant and prays the court for an order compelling the plaintiffs to make their complaint more specific, in this:

1.

That they and each of them be compelled to set out more specifically the alleged amounts which they and each of them claim
40 to have paid the assured, Sam. O. Smith, in the alleged policies of insurance through and by which they claim their said rights of subrogation.

2.

That they be compelled to set out more specifically the terms of said policy of insurance and file with their said complaint the said original policies of insurance under which they claim their right to recover, and upon their failure so to do defendant asks that said cause be dismissed.

After argument, at a day subsequent, said motion, upon the filing of said policy, was overruled by the court; to which ruling, at the proper time and in the proper manner, defendant duly excepted, as appears by the judgment-roll herein. Thereupon the defendant filed its plea of non-joinder, in words as follows, to wit:

Comes the defendant and says that Sam. O. Smith, to whom the policy of insurance alleged in the complaint was issued and to whom the said insurance was paid by plaintiffs, is a necessary
41 party to this action, and the same is not joined therein.

Therefore they would pray that plaintiffs be required to make the said Sam. O. Smith party to this action. Wherefore it prays, &c.

After argument, said plea was overruled by the court; to which ruling, at the proper time and in the proper manner, defendant duly excepted, as appears by the judgment-roll herein.

Thereupon the defendant filed its demurrer to each of the paragraphs of the complaint, as well as a general demurrer to the whole complaint; which demurrer is in words as follows, to wit:

For demurrer to first paragraph of plaintiffs' complaint defendant says:

I.

1st. That there is a defect of parties plaintiffs in this action, in this, that the assured under whom plaintiffs claim their right are not made parties hereto.

42 2nd. That the same does not state facts sufficient to constitute a cause of action in favor of plaintiff-.

II.

1st. To the second paragraph defendant, for demurrer, says that there is a defect of parties plaintiffs in this action, in this, that the assured under whom plaintiffs claim are not made parties thereto.

2nd. Because the said paragraph does not state facts sufficient to constitute a cause of action in favor of plaintiff-.

But said demurrer was overruled by the court after argument by counsel; to which ruling defendant duly, at the the proper time and in the proper manner, excepted, as appears by the judgment-roll herein, and now tenders its bill of exceptions.

Whereupon said defendant duly filed its answer to the complaint; which said answer appears in the judgment-roll.

43 Afterwards, a jury having been duly impaneled to try said cause, the plaintiff, to sustain the issues in said causes in its behalf, offered the following evidence:

The plaintiff read in evidence the following written instruments:

1st. A policy of insurance, numbered 100,470, issued by the Commercial Union Assurance Company of London to Sam. O. Smith & Co., dated at Little Rock, Arks., Nov. 11th, 1887, and signed by Gress and Leigh, its agents at the city of Little Rock, which policy expired on January 11th, 1888, and the material parts of which read as follows:

Whereas Sam. O. Smith & Co. have paid the sum of seventy-three & $\frac{50}{100}$ dollars to the Commercial Union Assurance Company, Limited, of London, for insuring from loss or damage by fire the property hereinafter described, not exceeding the sum specified on each article, viz., seven thousand dollars—form of cotton policy—

44 $7,000, on cotton in bales, their own or held by them in trust or on commission, while contained in the frame sheds Nos. 112 to 122, inclusive, and in brick shed and yard Nos. 115 to 123, inclusive, North Main street, and on platforms adjoining and in street immediately between the two sheds, Sanborn's map L. Rock, Ark.; and it is agreed and understood to be a condition of this insurance that this policy shall not apply to or cover any cotton which may at the time of loss be covered, in whole or part, by a marine policy; and it is further agreed to be a condition of this policy that only actual payment by bank check or otherwise for cotton purchased shall constitute delivery of cotton from the seller to the buyer; and it is further — that this company shall be liable

for only such proportion of the whole loss as the sum hereby insured bears to the cash value of the whole property hereby insured at the time of fire; and it is further agreed that tickets, checks, or receipts delivered to bearer shall not be considered as evidence of
45 ownership. Other insurance permitted without notice until required.

2nd. The following receipt was read:

LITTLE ROCK, ARKS., *Jan'y* 14, 1888.

Received from the Commercial Union Assurance Company of London the sum of sixty-eight hundred and ninety-one $\frac{28}{100}$ dollars in full of all claims and demands for loss and damage by fire, on the 14th day of Nov'b'r, 1887, to property insured under policy No. 100,470, issued at the Little Rock agency, and the said policy is hereby canceled and surrendered.

$6,960 88, amount of loss.
69 60, discount.

$6,891 28

SAM. O. SMITH & CO.

3rd. A policy of insurance, numbered 28353, issued by the Insurance Company of North America to Sam. O. Smith & Co., dated Little Rock, Ark., Oct. 19th, 1887, and signed by Adams &
46 Boyle, its agents at Little Rock, Arkansas, and which policy expired Nov. 19, '87, and the material parts of which reads as follows:

In consideration of the receipt of thirty-five dollars, — do insure Sam. O. Smith & Co. against loss or damage by fire to an amount not exceeding five thousand dollars—form of cotton policy—$5,000.00, on cotton in bails, their own or held by them in trust or on commission, while contained in the frame shed No. 112 to 122, inclusive, and in brick shed and yard — 115 to 123, inclusive, N. Main street, and on platforms adjoining and in street immediately between the two sheds, Sanborn's map Little Rock, Arkansas; and it is agreed and understood to be a condition of this insurance that this policy shall not apply to cover any cotton which may at the time of loss be covered in whole or part by a marine policy; and it is further agreed to be a condition of this policy that only
47 actual payment by bank check or otherwise for cotton purchased shall constitute delivery of cotton from the seller to the buyer; and it is further agreed that this company shall be liable for only such proportion of the whole loss as the sum hereby insured bears to the cash value of the whole property hereby insured at the time of fire.

And it is further agreed that tickets, checks, or receipts deliver-d to bearer shall not be considered as evidence of ownership. Other

insurance permitted without notice until required; loss, if any, payable to German Nat. Bank of Little Rock, Ark., as its interest may accrue.

4th. The following receipt was read:

Received of the Insurance Company of North America, of Philadelphia, Pennsylvania, through Adams & Boyle, agent-, the sum of forty-nine hundred and seventy-two $\frac{5}{100}$ dollars, being in full
48 accord and satisfaction of all claims for loss or damage by fire which occurred on the 14th day of November, 1887, to the property insured under policy No. 28353, issued at Little Rock, Ark., agency of said company, in consideration of which the said policy is hereby cancelled and surrendered to said company and all liability thereunder discharged.

GERMAN NATIONAL BANK OF LITTLE ROCK.

5th. A policy of insurance numbered H 1088, issued by the Sun Mutual Insurance Company of New Orleans to Sam. O. Smith & Co., dated Little Rock, Arks., October 17th, 1887, and signed by Gress & Leigh, its agents at Little Rock, Arks. The policy expired Nov. 17th, 1887, and the material parts of which read as follows:

In consideration of thirty-five dollars, to be paid to them by the insured hereinafter named, — do insure Sam. O. Smith & Co.
49 against loss or damage by fire to the amount of five thousand dollars—form of cotton policy—$5,000.00, on cotton in bales, their own or held by them in trust or on commission, while contained in the part one & two story frame and brick gravel-roof cotton sheds and compress building and platform adjoining on the east, situate Nos. 112 to 122, inclusive, N. Main street, block 79, Sanborn's map L. Rock, Ark.; and it is agreed and understood to be a condition of this insurance that this policy shall not apply to or cover any cotton which may at the time of loss be covered in whole or part by a marine policy; and it is further agreed to be a condition of this policy that only actual payment by bank check or otherwise for cotton purchased shall constitute delivery of cotton from the seller to the buyer; and it is further agreed that this company shall be liable for only such proportion of the whole loss as
50 the sum hereby insured bears to the cash value of the whole property hereby insured at the time of fire; and it is further agreed that tickets, checks, or receipts delivered to bearer shall not be considered as evidence of ownership; other insurance permitted without notice until required; loss, if any, payable to German National Bank, as its interest may appear.

End.: Octo. 29, '87. This policy is amended to cover in the frame shed, Nos. 112 to 122, inc., & in brick shed & yard, 115 to 123, inc., N. Main St., & in platforms adjoining & in street immediately between the two sheds, Sanborn's map L. Rock, Ark. Gress & Leigh, agents.

6th. The following receipt was read:

Received at Little Rock, Ark., February 4th, 1888, the sum
51 of forty-nine hundred and seventy-two $\frac{6}{100}$ dollars in full settlement of the within policy.

SAM. O. SMITH,
GEO. W. MARTIN,
Of the Firm of Sam. O. Smith & Co.
GERMAN NAT'L BANK OF
LITTLE ROCK.
C. T. WALKER.

It was also proved that payments were made as shown by said receipts.

Plaintiff then introduced the following witnesses, namely:

Mr. SAM. O. SMITH testified for plaintiff:

Q. State whether you were a member of the firm of Sam. O. Smith & Co. the 19th of October last.

A. Yes, sir; I was.

Q. Did your company take out these policies just read in evidence on the dates mentioned?

—. ——.

Q. Was the cotton mentioned in those policies burned up in the fire on the 14th of November, 1887?

52 A. Yes, sir; it was.

Q. Did you have it insured for its full value?

A. No, sir; it was not. That cotton, I think, carried $17,000 insurance, and the value of the cotton was $18,179—unbilled cotton. None of the cotton mentioned in those policies was billed by the R. R. Co. It was held as the property of our firm, on which no bills of lading were issued.

Judge CALDWELL: What was the value of the cotton?

A. $18,179.00, on which there was insurance of $17,000.00.

Q. Was it all insured?

A. It was intended to have been insured, but when the value was ascertained the insurance did not cover it all.

Q. Have the insurance companies paid for all the cotton that was insured?

A. Yes, sir; the full amount of the policies.

Q. Not the full value of all the cotton?

53 A. No, sir; we didn't happen to have enough insurance to cover the value of all the cotton, that's all.

Judge CALDWELL:

Q. How are those policies—on bales?

A. No, sir; upon all cotton not exceeding $17,000.00.

Cross-examination:

Q. The Sun Mutual Insurance policy is for $5,000, and they only paid you $4,972.06. What is the cause of that deduction?

A. There was an amount collected by the insurance company, placed in the hands of Adams & Boyle, for property saved, refuse, or something like that.

Q. In the Commercial Union Insurance Company there is a difference of $121.00. Was that caused in the same way?

A. Yes, sir.

Q. In the other there is a small difference; that for the same cause?

A. Yes, sir.

54 Q. These policies of insurance, while they covered $18,179.00 worth of cotton at that point, only amounted to $17,000.00?

A. Yes, sir.

Q. Your lot of cotton was worth $18,179.00 and you had $17,000 insurance?

A. Yes, sir.

Q. Was all the cotton destroyed?

A. Yes, sir.

Q. How long had the cotton been accumulating there, Mr. Smith—your cotton?

A. I think that some of the cotton had been in there from September on. It was in great part selections such as we had no immediate use for.

Q. Were they kept for the purpose of grading them?

A. No; they were already graded. It was selections, extra staples, fancy grades, etc. We had no place for them at the time; hadn't been able to sell them, and it was nearly all the cotton

55 that we had purchased that season. Some of — might have been there from September on.

Q. It was for storage, wasn't it?

A. Well, I can't say; we put it in there and kept it there.

Q. Did you know the condition of the cotton at the foot of Main St., in the compress shed, at the time?

A. Yes, sir.

Q. You knew of the accumulation of cotton there?

A. Yes, sir.

Q. You were secretary of the compress company?

A. Yes, sir.

Q. Did the compress Co. make any objection to your method of leaving your cotton there so long?

A. Yes, sir.

Q. What objection was made?

A. They said they were unable to take care of it; they only wanted to receive cotton for immediate shipment.

Q. You sent it there knowing that?

56 A. Yes, sir; we had no other place to put it.

Q. The policy issued by the Commercial Union Ins. Co. was issued November 11th, was it not?

A. Yes, sir; three days before the fire.

Q. By whom was it issued?

A. By Gress & Leigh.

Q. Where was their office?

A. On Markham street, in the Dodge & Meade block, Little Rock, Ark.

Q. How near to the foot of Main street to where the cotton was stored?

A. It is about 100 feet to Main and Markham.

Q. About 250 feet from where the cotton was stored?

A. I cannot tell exactly where the cotton was located; it was in one or the other of the buildings.

Q. Did the parties who issued this policy know the condition that existed at the foot of Main street?

A. You mean as to the quantity of cotton there?

Q. Yes.

57 A. I presume they did, sir; any one could see it.

Q. Was it not right back of their office?

A. Yes, sir.

Q. Within one hundred feet?

A. I suppose possibly it was.

Q. Does the same thing apply to this policy issued the 18th or 19th of October?

A. This issued on the 19th of October was issued by Adams & Boyle, agents for that company, and located at Little Rock, Ark.

Q. How far was their office from the compress shed?

A. About 210 feet further than Gress & Leigh; about 360 feet; somewhere along there.

Q. About a block?

A. Yes, sir.

Q. Did they know the condition—the accumulation of cotton at that point?

A. I presume they did; they were here.

Q. Was it a fact that was notorious all over the town—a matter of public notoriety?

58 A. Well, I don't know exactly how to answer that. The insurance companies knew when they were issuing their policies and the risk they were taking. They were down there looking at it.

Q. The Sun Mutual policy bears date of the 17th of October. Was it issued on that date?

A. Yes, sir.

Q. By whom?

A. Gress & Leigh.

Q. The same agents that issued the first policy you spoke of?

A. Yes, sir; Gress & Leigh.

Q. Who composed the firm of S. O. Smith & Co.?

A. S. O. Smith and G. W. Martin.

Q. Of what State are you and G. W. Martin citizens?

A. Citizens of Arkansas.
Q. How long have you been citizens of Arkansas?
A. Over 15 years; both of us.

Redirect examination:

59 Q. How many bales of cotton did you have there?
A. Our firm?
Q. Yes, sir; covered by this insurance.
A. I don't remember; I think, possibly, 369 bales. I could not say exactly.
Q. What was it worth?
A. From 8½ to 12½c. per pound.
Q. How much would a bale weigh?
A. I don't remember the weight.
Q. Did people bring cotton to be left for any considerable length of time? Did they receive any cotton that was brought there?
A. I could not say about that. I am rather under the impression that the general instructions were not to receive any cotton unless it was intended for immediate shipment.
Q. Do you remember any case when cotton was brought there and refused?
A. I could not say positively. I could not say any par-
60 ticular case; am under the impression that it was, though.
Q. Do you remember the name of any person that brought cotton there that was refused?
A. No, sir.
Q. Where was your office at that time?
A. On Scott, between Markham and Second.
Q. Were you there most of the time?
A. Yes, sir; I was there pretty much all the time.
Q. What was your business?
A. Cotton buying.
Q. What office did you hold in the Union Compress Company?
A. Secretary in the compress company.
Q. Did you say it was your intention to make a claim against the R. R. Co.?
A. That claim is in full charge of Mr. Geo. W. Martin. It is my understanding that it is his intention to make a claim.
Q. Mr. Martin is your partner?
A. Yes, sir.
61 Q. Have you any intention yourself of making a claim?
A. No, sir; I have no interest in the claim at present.
Q. How long since you disposed of your interest?
A. Since day before yesterday.

Plaintiff then offered to read in evidence the release from G. W. Martin and Sam. O. Smith, executed since the commencement of this suit, which was in words as follows:

LITTLE ROCK, *Feb'y* 22, 1890.

For value received we hereby release to the St. Louis, Iron Mountain & Southern Railway Company all damages that we may have

any right to claim by reason of the destruction of any and all cotton caused by fire in the city of Little Rock on the 14th day of November, 1887.

(Signed) GEO. W. MARTIN.
SAM. O. SMITH & CO.,
By GEO. W. MARTIN.

62 To the introduction of said written release in evidence defendant, at the time and in the proper manner, objected as incompetent, irrelevant, and immaterial; but the said objection was overruled and the release read to the jury; to which ruling of the court the said defendant then and there excepted.

Capt. W. H. WRIGHT testified for plaintiff:

Q. Will you state what position you occupy now with reference to the Union Compress Company?

A. I am its president.

Q. What position did you occupy with reference to it in 1887?

A. President of the company.

Q. Will you state where, in 1887, November, the compress and compress sheds of the Union Comp. Co. were located?

A. The compress sheds were at the foot of Main street, in
63 Little Rock, Ark.; previously we had the compress located there. It was moved, I believe, in September to the eastern portion of the city.

Q. At the time of the fire in November had the compress machinery been removed from the foot of Main street?

A. Yes, sir.

Q. Now, then, how long did you continue to compress cotton at the foot of Main street?

A. We quit the previous season, in May or June.

Q. When was that compress shed located at the foot of Main street, do you know?

A. In 1884, I believe.

Q. What was it then—the Union Comp. Co.?

A. It was the property at the time of the Little Rock Oil and Compress Co.

Q. What was the business of that company?

A. The compress department was the compression of cotton?

64 Q. Did it have any other place for compression except there?

A. Also at Argenta.

Q. When was that erected at Argenta?

A. In 1881 or 1882. I think 1882 was the first year.

Q. Will you state the method of compressing cotton; whether or not the cotton that was received at the foot of Main street when it was the property of the oil and compress Co. was compressed at that place or whether it was received there and moved to Argenta for compression, or whether the cotton that was received at Argenta

was compressed there and the cotton received here was compressed here?

A. We received cotton at the foot of Main street for transshipment to Argenta. That was before the compress was built at the foot of Main street.

Q. Now, what arrangement existed between the railroad
65 Co. and the compress Co. with reference to the transshipment of cotton from the foot of Main St. to Argenta?

A. My recollection is that the railroad Co. transported the cotton from Main street to Argenta free.

Q. Transported it free?

A. Yes, sir.

Q. Now, that was for 2 years previous to 1884 when you located the compress machinery there?

A. We constructed a compress in 1884 at the foot of Main street.

Q. Now, then, after you constructed the compress at the foot of Main street did you continue to carry cotton from there over to Argenta?

A. It was received and compressed there.

Q. How long did that arrangement continue to exist?

A. Three years; from 1884 to 1887.

Q. What was done with the cotton after it was compressed?
66 A. It was taken in charge by the R'y Co.

Q. Who paid for the compression of it?

A. The R. R. Co.

Q. Capt. Wright, if you remember, was it the custom of the railroad Co. to issue b. l. for cotton previous to compression or subsequent to compression?

A. Previous to compression.

Q. Who made that arrangement with the R'y Co., do you know?

A. The arrangement was originally made by Mr. Urquhart, who was president of the Little Rock Oil and Compress Company, with officials of the I. M. R'y in St. Louis.

Q. Then, if I understand you, the cotton was billed before compression and billed at that point at the expense of the railroad, and by them loaded into the car and carried off?

A. We had nothing to do with the billing, except as we were instructed by the owners of the cotton.

67 Q. Did you have a receiving clerk there at that time?

A. Yes, sir; we had a receiving clerk there.

Q. Did the defendant in this case pay any portion of that receiving clerk's salary? Now, that is previous to the removal of the compress machine.

A. There were two clerks.

Q. You mean on this side of the river?

A. Yes, sir; I mean on this side of the river, previous to the time that the machine was removed. *A.* There was a receiving and a shipping clerk.

Q. Who was the shipping clerk in the employ of?

A. The shipping clerk was paid by the R. R. and ourselves jointly.

Q. Now, where was the machinery from the foot of Main street moved to?

A. The present grounds belonging to the Union Compress Co., in the eastern portion of the city.

68 Q. What arrangement was made then with the railroad Co., if any, with reference to the moving of cotton?

A. I do'nt understand you exactly.

Q. When the machinery was moved to the eastern portion of the city was any arrangement made with the railroad by which the cotton was to be shipped from Little Rock to either of the compresses of the company?

A. Yes; an agreement was made to transport the cotton to its compress in Argenta, from the foot of Main street, until such time as the other compress would be in operation.

Q. Now, was that the same arrangement or a different arrangement which had been entered into previous to the erection of the machinery at the foot of Main street?

A. I think it was a different arrangement. There were different officials in charge of the road. Mr. Newman succeeded
69 to the previous traffic manager, and he insisted upon $2.00 per car.

Q. Who was to pay that?

A. The compress company.

Q. In 1887 do you remember the time of the fire?

A. 14th day of Nov., 1887—yes, sir.

Q. How many bales of cotton were in the sheds of the compress Co. at the foot of Main street at that time?

A. I think there was from 3,600 to 4,000 bales; I do not remember exactly.

Q. At the time of the fire you state that there was from 3,600 to 4,000 bales of cotton in the compress sheds?

A. Yes, sir.

Q. Do you know what amount of this was billed and what amount was unbilled?

A. I think from 2,600 to 2,800 or 3,000 bales were billed; I do not remember exactly.

Q. Will you state to the jury the exact manner of doing
70 business between the comp. Co. and the R'y Co. with reference to the shipment of *of* cotton; when and how it was shipped?

A. We shipped it at the order of the railway company.

Q. Well, just state how these orders were given, please.

A. Issued by the general fr't agent or ass't gen'l fr't agent at this point.

Q. And was given to the owner of that cotton when it was received by the Union Compress Company?

A. A ticket of the Union Compress Company? (Ticket shown to witness:) Yes, sir; that is one of the tickets.

LITTLE ROCK, ARK., ——, 188–.

Received by Union Compress Company from —— ——.
Account of —— ——.
For compression.
Storage after ten days will be charged.
Not responsible for any loss by fire.

Marks. No. bales cotton.

71 Q. Now, what was done with that ticket by the holder of it in order to get shipment?

A. Took it to the railroad, to the delivery agent of the railroad, who made an order on us for the shipment of that cotton, after issuing the b. l. for the cotton. Then we would insure the cotton upon receipt of this notice from the railroad Co. after they issued a b. l. The order issued to us by the railway company was an order directing us to compress the cotton, after having informed us that they had issued bills of lading, and a further order to load it on the cars. This order was issued to us both by the St. Louis, Iron Mountain & Southern R'y Co. and the Memphis & Little Rock R. R. Co., and referred to cotton upon which each of those companies had issued bills of lading for cotton both at the compress ware-
72 house at the foot of Main St. and at the compress in Argenta, across the river. The order read as follows:

"UNION COMPRESS CO., LITTLE ROCK, ARK., 9 11*th*, 1887.

I have this day issued on your dray receipts b. l. to Jno. Smith & Co. for 100 bales cotton.

Marks.	No. bales.	Weight.
A. B. C.	1,000.	50.000.

Ship the above cotton by the St. L., I. M. & S. R'y via St. Louis, for account of A. R. Bragg, agent.

D. F. A."

Q. Now, Capt. Wright, you state that there was from 26 to 2,800 or 3,000 bales of cotton which had been billed. How long had it remained there, do you remember?

A. I think some of it was there as long as six weeks or two months.

(Mr. JOHNSON:) Testify what you know, Capt. Wright.

A. That is my recollection. I feel sure some of it was there six weeks.

73 Q. Will you now describe to the jury how the compress grounds were situated or located? (I expect that Capt. had better make a diagram on this paper.)

A. At the foot of Main street, 3 blocks on the west side, and 4 on the east side, taking in the street and the lots between those two blocks; the depth of the warehouse proper was one lot, say 150 feet. There were 3 lots on the west side and 4 on the east side, making 7 lots of ground; half of the lots on the west side excavated for the machinery, compress, boiler, and so on.

Q. How near was the R'y track? Describe to the jury how near the R'y track ran to the compress shed.

A. What was known as the compress siding was within 18 inches of our platform, on a level with the car door. The main track was some four or five feet distance north. I do not know the
74 exact distance; what is usual, I suppose, between sidings and main line.

Q. Was demand made on the R'y Co. for shipping facilities for that cotton?

A. Yes, sir.

Q. By whom and how often? State the circumstances.

A. The demand was made repeatedly upon all the officials we knew here, and also at St. Louis; also to the traffic manager for transportation for the cotton.

Q. Who made it?

A. I made it.

Q. How often?

A. I cannot say, except to say that I made it repeatedly, and sent our compress superintendent to the local superintendent here.

Q. Was the cotton in an exposed condition at the time of the fire?

A. The cotton was in the same condition that it had been
75 for a year—that is, for that season of the year. The cotton was piled up there at some distance from the railroad track.

Q. What was the character of the weather?

A. The weather was exceedingly dry.

Q. For how long?

A. It was a very dry season. I remember that it was remarked by everybody that it was unprecidently dry.

Q. Capt., we would like to have something definite about the time you made these demands. How long previous to the fire?

A. Well, the demands were made often. I telegraphed a long telegram to Mr. Newman.

Q. Who was Mr. Newman?

A. He was the general traffic manager and third vice-president of the road; and on one occasion the managers of the road were here and saw the condition of the cotton.

Q. Now, can you locate something near the time when they
76 were here? How long previous to the fire, about?

A. I was in St. Louis on the 8th day of November. If I remember, I returned from St. Louis on November 8th, where I went to impress upon the officials of the road the condition we were in here in regard to the transportation of cotton. I think I left here about the 6th and back on the 8th.

Q. Now, you have not told us how long you had been demanding and how long there had been a necessity for a demand for transportation previous to this time. You say you had been sending tel-grams.

A. I suppose the correspondence would cover two months or more. I cannot give date exactly unless I should refer to the correspond-

ence. I know the accumulation of cotton that season was quite early. It came in unusually early.

Q. Capt. Wright, will you state what understanding there
77 was as to the delivery of cotton at that point with the cotton buyers or shippers, whether it was known to the public as a place for the shipment and receiving of cotton for shipment?

A. Yes, sir; it was known to the buyers as such.

Q. About how many bales were shipped from there; do you know or can you approximate?

A. I have forgotten that. It is a matter of record and can be ascertained. I have forgotten the quantity of cotton received.

Q. You can ascertain? I wish you would, please.

— ——.

Q. What use was made of the space between the lots there at the foot of Main street?

A. We had a lease from the city for the purpose of storing or placing cotton on it.

Q. Was cotton stored in there at the time of the fire?

A. Not stored there; it was placed there.

Q. In the street?

78 A. Yes, sir.

Q. About what quantity?

A. As much as the street would hold except the gangway.

Q. What gangway?

A. There was a gangway left for people crossing to the Athletic Association, and a gangway, I think, next to the compress for moving the cotton.

Q. What access was there to the river except through the gangway?

A. There was none.

Q. What was the width of that gangway?

A. Four or five feet.

Q. Capt., one more point before I close your testimony, and that is with reference to the contract between the railroad company and the compress company. Now, I want to understand that. What was the agreement between the two companies with refer-
79 ence to the furnishing of transportation; how and when, and upon whose demand was it furnished?

A. The transportation was to be furnished when it was needed. They were to furnish the transportation necessary to carry off all cotton that was put there.

Q. Capt. Wright, we will close now with the understanding that you will get us the statement of the cotton that was shipped, please.

A. That is, the cotton we had received?

Q. Yes, sir.

(Item never furnished.)

Cross-examination:

Q. What company was it that was occupying this warehouse at the foot of Main street at the time of the fire?

A. Union Compress Co.

Q. The fire occurred the 14th day of November, didn't it?

A. Yes, sir.

80 Q. How long had the Union Compress been in existence at that time?

A. Since June 22nd.

Q. That company, then, was organized on the 22nd of June, 1887?

A. Either on the 6th or 22nd. It is my recollection that it was on the 22nd.

Q. And was constructing at the time this fire occurred a compress in the eastern portion of Little Rock?

A. Yes, sir.

Q. Who made the arrangement with the railroad company on the part of the compress company for transportation rates?

A. Mr. Howell made the arrangement in St. Louis, in September.

Q. Where did he make the arrangement?

A. In St. Louis.

Q. Were you present at the time?

A. I was not.

Q. Did Mr. Howell make that arrangement?

A. Yes, sir; with Mr. Newman.

81 Q. Who was in possession and control of the warehouse and cotton stored at the foot of Main street?

A. The Union Compress Co.

Q. You say the Union Compress Co. had control and possession of this ground?

A. Yes, sir.

Q. Who was in immediate charge of the ground representing the Union Compress Company?

A. Mr. Bland was superintendent of the company at that time. He had charge of both sides of the river.

Q. Who occupied the cotton shed immediately east of Main St.?

A. Union Compress Co.

Q. I want you to state how far down the river, going east from Main street, the cotton storage continued.

A. 4 blocks. I mean 4 lots, 150 feet each.

Q. Was there cotton stored immediately across Scott street?

A. I think the whole street was covered with cotton.

82 Q. Did not that continue across east of Scott street?

A. I think there was cotton stored up to Elm street east and down Elm street. I am not sure about it. It is all a matter of recollection.

Q. Where is Elm street?

A. Elm street is a street running parallel with Markham street.

Q. Capt. Wright, did the R. R. Co. have any control of the sheds or of the cotton that was stored at the foot of Main St.?

A. They had no direct control of the shed, but they had control of the cotton.

Q. In what way did they have control of it?

A. Cotton on which bills of lading were issued.

Q. Was it in their possession or in the possession of the compress company?

A. The possession of the compress company for the R'y Co.

83 Q. What was the condition of the cotton bills of lading were not issued for?

A. It was under the control of the owner.

Q, But it was in the possession of the compress Co., wasn't it?

A. We had it for the compress Co. for the owners.

Q. Now, I was going to call your attention to what you said a moment ago with reference to making up lots of cotton by the cotton buyers. You said they sometimes waited a few days until the cotton buyer had made up his lot—such a quantity such as he wanted to send off. He would let some of it lie at your sheds, would he?

A. Yes, sir.

Q. And would not get his b. l. until he had made up the lot he wanted to ship out?

A. Yes; that was a matter of common custom.

Q. Now, the cotton was not ready for shipment until the lot had been made up?

84 A. That was the manner. Then the railroad Co. transported over to Argenta at $2.00 per car. They charged us $2.00 per car for their services.

Q. Did you have any other compress than the one that was at Argenta in operation at that time?

A. No, sir.

Q. It was not until later that your compress was in operation in Eastern Little Rock?

A. Yes; I think we commenced receiving cotton about the 7th or 8th of November—about one week before the fire.

Q. You state that there was an unusual and unprecedented season—an unprecedented crowding of cotton that season?

A. Yes, sir.

Q. Did cotton come much earlier than usual at this season?

A. Yes, sir.

Q. On account of the character of the weather, I suppose?

A. Yes, sir.

Q. About how much earlier was the crop than usual?

A. I think there was a lot of cotton here in August.

85 Q. Did you have any other space for storing cotton in the city besides that?

A. No, sir.

Q. Cotton buyers when they bought their lots of cotton were accustomed to come and store it with you at that place?

A. Yes, sir.

Q. What was the condition of your compress at Argenta?

A. In what way?

Q. Was it crowded with cotton over there?

A. Yes, sir.

Q. Did any other road besides the I. M. road pursue this same course of business with you?

A. Yes, sir.

Q. What other road?
A. Memphis & Little Rock.
Q. Cotton buyers would pursue the same course with their compress receipts?
A. Yes, sir.
Q. And that cotton would be held until carried out by the I. M. R'y over to the compress at Argenta?
86 A. Yes, sir; and delivered to the Memphis road for shipment to its destination at Argenta.
Q. Who loaded the cotton on the cars at your warehouse?
A. The Union Compress Co.
Q. Who unloaded them at Argenta?
A. The Union Compress Company.
Q. And who loaded it for final shipment?
A. The Union Compress Company.
Q. Did the Little Rock & Memphis road pay you in the same way and at the same rate for compressing the cotton that the I. M. did?
A. Yes, sir.
Q. What was the manner of doing business as to the loading of cars? Was there a side track down there?
A. Yes, sir; there was a side track.
Q. Could you tell me the number of employees you kept at the shed?
A. No, sir; not without referring to the pay-rolls.

87 Redirect:

Q. You say you were not present when the contract was made with the R. R. Co. From whom did you get your information?
A. Mr. Howell.
Q. Now, what contract had existed previous to that time, or, rather, what do you know of the contract that existed previous to that time? Did you know of the contract with the railroad?
A. Yes, sir; the contract was the same.
Q. You are asked that if the compress was crowded at that time will you state whether or not the compress capacity was sufficient to have compressed what cotton was on hand and relieve this state of blockade down here?
A. Yes, sir.
Q. Was sufficient?
A. It was sufficient.
Q. Upon that point do you remember up to what date the
88 railroad company issued bills of lading? Did they refuse to receive any cotton at this compress shed?
A. No, sir; they never did.
Q. You say up to the date of the fire?
A. I think they issued bills of lading on the very day of the fire; that is my recollection of it.
Q. Capt., I don't know whether we understand you or not. We understand you to say that tickets were given to the owner, and when he presented them to the R. R. Co. bills of lading were issued

upon them, and upon that fact could you take out insurance for the benefit of the railroad Co. at once?

A. Yes, sir; at once.

Q. Now, if I understand you, on cross-examination you stated that cotton was piled continuously from the east end of the compress ground on down east of Scott street; was it?

89 A. Yes; cotton was piled from one end to the other.

Q. But did other parties have cotton piled along down north of Elm street?

A. I think there was cotton piled along Elm street. I cannot answer sure, but at that time cotton was piled about considerably.

Q. Did the railroad have any other place in Little Rock for the reception of cotton except this ground?

A. Yes, sir.

Q. Where?

A. They have fr't depot, and I also think they had at that time also at the foot of Rock street, near the bridge.

Q. They had a depot?

A. I do not know that any cotton was received up there, but it may have been.

Q. Do you know what amount was received at the other place?

A. No, sir; I don't.

90 Q. And you do not know that there was any received at Cumberland street?

A. No, sir.

Q. Here is a plan. Look at it and see if it is right.

(Plat here offered in evidence as follows:)

(Here follows diagram marked page 91.)

92 A. It is.

Q. Now, Capt. Wright, on this diagram you can explain to the jury. I understand that to be Main street running down to the river?

A. Yes, sir.

Q. Cotton was piled on Main street here?

A. Yes, sir (designating the foot of North Main street).

A. P. HOWELL testifies for plaintiff:

Q. Mr. Howell, state where you live, please.

A. Live in Little Rock.

Q. How long have you been living here?

A. 10 years.

Q. What business have you been engaged in during that time?

A. Cotton buying.

Q. What business are you engaged in now?

A. Cotton buying still.

Q. What is the name of your firm?

A. Howell Cotton Company, now.

. Look at that receipt. Is that your signature?

. Yes, sir.

Q. Does that refer to the cotton that was insured by the Marine Ins. Co. in controversy now?

A. Yes, sir.

Q. Are you acquainted with the signature of R. E. Douglass & Co.?

A. Yes, sir.

Q. Is that their signature?

A. Yes, sir.

Q. Mr. Howell, did you at any time have any connection with the Union Compress Company?

A. Yes, sir.

Q. Were you an agent of that company?

A. Yes, sir; I was director at the time of the fire.

Q. How long had you been a director of that company?

A. Since June, 1887.

Q. That was at the time it was organized, was it?

94 A. Yes, sir.

Q. Do you know anything of the contract between the Union Compress Co. and the St. L., I. M. & S. R'y Co. for transportation of cotton from Little Rock to Argenta for the purpose of compression?

A. Yes, sir.

Q. State what the contract was and when it was mad-, as nearly as you can remember.

A. Well, I went to St. Louis in 1887, and it was virtually a renewing an old contract that the Little Rock Oil Company had had with them. The agreement was that the compress company would pay the railroad $2.00 per car for transporting the cotton from Little Rock to the Argenta compress.

Q. Was the R. R. Co. to transport all the cotton received at the compress at that rate?

A. Yes, sir; until otherwise agreed upon.

Q. Had you been connected before that time with the Little

95 Rock Oil Company?

A. No, sir.

Q. You had not?

A. No, sir.

Q. How long had that contract been acted upon by the railroad Co. and the compress Co. at the time the fire took place?

A. Well, the arrangement was made with the railroad company in the early part of September—I do not remember the date—and the fire occurred on November 14th.

Q. And during that time had the R'y received cotton and transported it to Argenta at your sheds?

A. Yes, sir.

Q. Did they transport the cotton from your sheds to Argenta as fast as it arrived there?

A. Well, no, sir. The cotton laid there some time. They were moving all the time, and the cotton was not always carried to the car as soon as it went to the shed.

96 Q. Had there been any remonstrance made by the com-

press Co. to the officers of the railroad Co. on account of the delay in transporting the cotton under their contract?

A. Yes, sir.

Q. Who was that made by?

A. By Capt. Wright mostly. He was in charge of the compress.

Q. Did you have any communication with the officers of the road about that?

A. I did not personally. Capt. Wright did most of the time.

Q. Did he go to St. Louis to see some of the parties there about it?

A. No, sir.

Q. Do you know that there had been complaint made to the officers of the company in regard to this delay in moving the cotton?

A. Yes, sir.

Q. You know that it had been done?

A. Yes, sir.

97 Q. You stated, Mr. Howell, I believe, that the contract that you made on behalf of the Union Compress Co. with the R'y Co. was a continuation of the old contract which had been in force between the Little Rock Oil Co. and the R'y Co.?

A. Yes, sir.

Q. Was not there a reduction, a slight reduction, in charge made by you—15 cents to 13 cents?

A. No, sir; not at that time.

Q. When was that made?

A. I think the season before.

Q. The season before?

A. I think it was. I am not sure about that.

Q. Who did you make your contract with?

A. Mr. Newman.

Q. What office did he hold in the R. R. Co. at that time?

A. I think he was general traffic manager.

Q. When did you make that contract?

A. I think it was in the Southern Hotel, at St. Louis.

Q. Did you go for the purpose of making the contract?

98 A. Yes, sir.

Cross-examined:

Q. A contract existed and agreement with the railroad Co. to charge $2.00 per car?

A. Yes, sir.

Q. From Little Rock to Argenta?

A. Yes, sir.

Q. That contract was verbal; it was not in writing?

A. No, sir.

Q. No time specified in which the cotton was to — shipped?

A. No, sir.

Q. Did that apply to all cotton that was received by the compress Co. at its warehouse?

A. Well, nothing particular said about that.

Q. Did that apply to the cotton to be shipped by any road?
A. Yes, sir; the Iron Mountain road was to do the hauling.
Q. It applied, then, to all the cotton to be shipped to the Argenta compress?
A. Yes, sir.
99 Q. You state that the cotton was not always ready to go to the compress as soon as it was delivered at the warehouse. Why was that?
A. Well, the buyer did not have lots completed, and they accumulated until they completed their lot, and until the cotton could not be shipped to the compress—at least it was not understood that it was to be shipped.
Q. It was not the usage?
A. No, sir.
Q. Now, do you know whether there was a good deal of cotton there for which bills of lading had not been issued?
A. Doubtless there was considerable.
Q. About how much?
A. I could not say, Mr. Moore.
Q. Was not there as much as $\frac{2}{3}$ of the cotton not billed at the time of the fire?
A. I do not know, but I think there was about $\frac{1}{2}$ of it.
Q. What was the character of the season in regard to bringing in cotton? How about the market?
100 A. Very early.
Q. What effect did you think that the fact of its being an early season had on the bringing in and handling of cotton?
A. Well, I do not know the cotton came in much earlier than usual. It seemed crowded and blocked all over the country. It came ahead of time.
Q. Was there any serious trouble at this place during the season before that?
A. I don't think so; a little, but not much.
Q. You say it was general throughout the country?
A. Yes, sir; from what I heard.
Q. How long have you been in the cotton business, Mr. Howell?
A. About 12 years.
Q. At this place most of the time?
A. No, sir; about 10 years here.
Q. I wish you would state how that season compared with other seasons during your experience here.
101 (Objected to by Judge Rose.) Objection overruled.
A. Well, I think the cotton began to come in about three weeks earlier than usual, and we seemed to have a very dry summer. It came very rapidly, seemed blocked up everywhere, the whole country was blocked everywhere, complaint of railroad being short of cars and everything.
Q. It was unexpected, and therefore unprovided for to some extent?
A. Yes, sir.

Q. Have you known any such rush since?
A. No, sir.
Q. What time is the cotton generally gathered in ordinary seasons?
A. Generally by the first of January.
Q. Do you mean gathered by the first of January in ordinary seasons?
A. Yes, sir.
Q. By what time was it gathered during that season?
102 A. Well, I think by about the first of January.
Q. Wasn't it much earlier that season than usual?
A. Well, I don't remember just about that.
Q. Isn't it a fact, Mr. Howell, cotton is not usually gathered until about February?
A. They are generally through picking by the first of January.
Q. I mean, Mr. Howell, brought in the market. By what time do they generally get cotton in the market?
A. The bulk of it is generally in by that date.
Q. Are these the warehouse receipts for the cotton that you had insured? (Shows tickets to witness.)
A. I think they are. These tickets were the receipts given us by the Union Compress Company as warehouse receipts, and we held them as against the compress company. The ticket reads as follows:

LITTLE ROCK, ARK., *Oct.* 22, 1887.

103 Received by Union Compress Co. from Howell & Co., account of Howell Cotton Co., for compression.
Storage after ten days will be charged.
Not responsible for any loss by fire.

Marks. No. bales cotton.

Q. No bills of lading had been issued for this cotton?
A. No, sir.
Q. In charge of the compress for you?
A. Yes, sir.

(Mr. MOORE: I want to call the attention of the jury to that fact, that no bills of lading had been issued for cotton sent in from time to time by Howell & Co.)

Q. For what purpose was you leaving this cotton at the warehouse, Mr. Howell?
A. That?
Q. Yes, sir.
A. It was a little cotton that had been placed, and the lot
104 was not completed.
Q. Not ready for shipment, was it?
A. No, sir.
Q. It was not in a condition that cotton was usually in when the company sent it over the river to the compress?
A. No, sir. If I remember right, it was a little staple cotton, setting it aside to get the thing completed.

Q. According to the usage of the compress Co., this cotton was not ready to go over to the comp. at Argenta until you got your lot made out. This is the fact, isn't it?

A. Yes, sir.

Q. Mr. Howell, were you a director and member of that comp. Co.?

A. Yes, sir.

Q. Who was in charge of the ground down there at the foot of Main street—what you call the cotton sheds of the compress company?

A. Why, I think Mr. Bland was superintendent at that time.

105 Q. For whom?

A. For the compress Co.

Q. And the compress company was in possession of the grounds?

A. Yes, sir.

Q. Did Mr. Bland represent the compress Co.?

A. Yes, sir.

(Objected to by Judge Rose.)

Cross-examination:

Q. Mr. Howell, were you familiar with the condition of the cotton shed at the time you deposited the cotton there?

A. At the time I sent my cotton there?

Q. The cotton that is represented by these tickets; was it not deposited there?

A. Yes, sir.

R. E. DOUGLASS testified for plaintiff:

Q. Mr. Douglass, you live here in town, I believe?

A. Yes, sir.

Q. In the cotton business?

106 A. Yes.

Q. Have been for a long time?

A. For about seven years.

Q. What is the name of your firm?

A. R. E. Douglass & Co.

Q. Just look at that receipt and state whether it was signed by your firm.

A. Yes, sir; I signed it myself.

Q. That represents the real transaction, does it?

A. Yes, sir.

Q. Mr. Douglass, did you have any connection with the Union Comp. Co. in 1887?

A. Well, I was a stockholder in the Union Comp. Co., which succeeded the Little Rock Compress Company.

Q. That was organized in June of that year, I believe?

A. I think it was.

Q. Were you a director also?

A. No, sir.

Q. Do you know anything about the accumulation of cotton there that fall?

107 A. Well, yes; there was considerable cotton accumulated during the month of November and possibly before that time.

Q. What time did the cotton begin to form and blockade there?

A. Really I do not remember; suppose more or less for a month, possibly.

Q. Were the sheds full at the time the fire took place?

A. I think it was; yes, sir.

Q. Some of the cotton piled outside?

A. The street, with the exception of the sidewalk, was full, I think, up close to the alley.

Q. Piled up, was it?

A. It was not tiered up. I think most possibly that some of it was headed up, and some of it lay on its edge.

Q. Sidewalks open on both sides?

A. Sidewalks were open on the east side, and I think there was a gangway 4 or 5 or 6 feet or something like that on the west side. I do not remember positively.

108 Q. On the east side there was a passage?

A. I suppose there was a sidewalk passage. I do not remember positively.

Q. Going down Main street on the sidewalk there were some steps?

A. Yes, sir.

Q. And then some more going down to the railroad?

A. Yes, sir.

Q. When was the cotton piled on the south side?

A. It was on the south side of those steps—yes; where the head of the steps were, I think, was clear, but it was piled on the south and west.

Q. Wasn't there cotton on the east side there, too?

A. Doubtless.

Q. Wasn't there cotton on the sidewalk?

A. I do not know about that.

Q. Who was it that was occupying that ground over there at the time of the fire west of Main street?

109 A. I suppose it was the compress company.

Q. The compress company had cotton on both sides of the street?

A. Yes, sir.

Q. And also on the west side?

A. East and west.

Q. How wide was that street?

A. 30 feet wide.

Q. What was the shed made of?

A. The shed on the right-hand side—east side—was a brick wall, possibly 12 or 14 feet high, and there was an office building, I suppose, about 15 or 20 by 30 or 40 feet; at the southwest corner

it was open, with the exception of towards the railroad; the most of it was open space.

(Diagram shown to witness. Witness describes walls, etc.)

Q. Now, there was cotton piled down here where the machinery had been, was there not?

A. No, sir; the machinery was in an old shed immediately
110 east of this warehouse, and I don't think that was used; this was used for cotton all the time.

Q. That would be right there (pointing), would it?

A. Yes, sir.

Q. What were the floors made of?

A. I think it was what you call about 2 x 4."

Q. I mean wood?

A. Wood, I think.

Q. How many floors, one or two?

A. I don't know, sir.

Q. Had they laid planks out over there where that cotton was placed in the street?

A. In the street I think a good deal of it was planked up. I think it had to be.

Q. Was there a rail on the crossing in there?

A. I don't know. I don't remember positively.

Q. Were those steps that you speak of going down to the railroad, across to the boat-house, of wood or metal?

A. They were of wood.

(ROSE:)

Q. Some of these receipts are given on the new blanks of
111 the Union Comp. Co., and some of them on the old blanks of the Little Rock Oil & Compress Company. How did that happen?

A. I suppose they did not have enough tickets, and had these old ones on hand, probably.

(Tickets considered in evidence.)

Cross-examination:

Q. Mr. Douglass, were you familiar with the condition of the cotton shed?

A. I saw it every few days; I saw it daily.

Q. These are the receipts that show the dates of delivery from Oct. 6th to Oct. 25th. How came you to let this cotton accumulate there?

A. In getting up cotton here we probably had some cotton that was not regular, and occasionally some extra staple cotton—something entirely different from the cotton that we had orders for. We sent it all in and let the compress company kick about it.

112 Q. Why did the compress company kick about it, Mr. Douglass?

A. Well, they did not want to do any storage business.

Q. They objected to holding it so long, did they?
A. Yes, sir.
Q. And you could not ship it very well until you got your lots made up to meet your orders?
A. No, sir; but of course, while there was some of this cotton, the large majority would have been billed in a day or two.
Q. You mean would have been billed within a day or two after the fire?
A. Yes, sir.
Q. Mr. Douglass, do you know of your own knowledge how much unbilled cotton there was there?
A. No, sir; I do not.
Q. Have you no knowledge about that?
A. No; I have not.

JOHNSON:

Q. You know there had been a large amount of cotton unbilled?
A. Yes, sir.
113 Q. Do you remember what rate of premium you paid on this cotton?

(Objected to — Rose for pl'ff. The objection was sustained, and the defendant, by its counsel, then and there duly saved its exception.)

SAM. O. SMITH testified for plaintiff:

Q. Were you here in 1887 at the burning of the compress sheds?
A. No, sir.
Q. Were you living here at that time?
A. Yes, sir.
Q. How long had you been away?
A. I left Saturday.
Q. Mr. Smith, what relation did you have to the compress company at that period?
A. I was director and secretary.
Q. What was the condition of the cotton at the compress cotton shed at the date of the fire? Did you know it?
A. I cannot say on the exact day of the fire, sir.
Q. Well, the Saturday before?
114 A. It was in a very crowded condition.
Q. For what length of time had it been in that condition?
A. Well, it had been crowded then for six weeks.
Q. Do you know whether or not any demand had been made for shipping facilities?
A. Yes; demand had been made.
Q. How often?
A. I cannot say. It was done through the president. I know it was done repeatedly.
Q. Do you know how many bales there were at the shed at that time?
A. In the street and in both sheds there were about 3,600 bales.

Q. Do you know how much of that was billed and how much unbilled?

A. There were 2,692 bales billed, as we decided, after considerable checking of it. That is my recollection of the figures.

Q. How was that cotton stored? What was the storage
115 capacity of the compress for receiving or taking care of cotton?

A. Well, this cotton was stored in both stores of the sheds on the west side of Main street and in Main street and in the warehouse containing lots 210 feet in length, I believe, and also in two-story platform and shed immediately north of the warehouse, east of Main street, occupying all the space that the company had control of.

Q. Do you know how long that cotton had been there?

A. What cotton?

Q. The cotton that burned.

A. No, sir; cotton was being received and shipped out daily. I could not say without referring to the books.

Q. Will you please state to the jury the method of carrying on business between the railroad and the comp. Co. with reference to the cotton, and who was the managing party that received
116 the order, if any order was given, to the railroad Co. to ship it?

A. Well, the method of doing business there was about like this, if I understand your question correctly: When cotton was received there a memorandum receipt was issued by the comp. Co. to the transfer. The transfer Co. took that receipt to the owner of the cotton. When the owner of the cotton desired b. l. he took such receipts that he desired to be kept out to the railroad Co. and obtained b. l., notifying the comp. Co. that they had so issued the b. l. and to compress it.

Q. Now, was there anything else they were to do besides compress it?

A. Who, the railroad Co.?

Q. No, sir; the compress Co.

A. No; that was their business—compressing.

Q. Did they take out insurance?

A. Yes.

Q. For whose benefit?

A. For the benefit of the railroad.

117 Q. How long had this been a receiving place for cotton?

A. Up to the time of the fire?

Q. Yes.

A. Yes; I think 5 or 6 years.

Q. What was the general understanding with cotton buyers and shippers with reference to that being a receiving place?

A. Well, no understanding, with the exception that if they delivered their cotton there they were to get compress receipts on it on which they could get bills of lading whenever desired.

Q. Was any cotton delivered there except for compression and shipment?

A. That I cannot say.

Q. There was this understanding, however?
A. What time do you refer to—the day of the fire?
Q. Yes.
A. You will understand that about six weeks previous to
118 the fire we were in a very crowded condition. We had a registry system with parties who desired to get cotton into the shed, so that they would have to register the marks and No. of bales, and also there was an agreement that no cotton should be sent there, except that was ready for immediate shipment and when it was sent there. That was about the understanding of it.
Q. Do you know anything about the contract between the railroad Co. and the comp. Co. with reference to the shipment of cotton?
A. With reference to the shipment of cotton?
Q. Yes, sir. Transshipment to the other side?
A. There was a contract or agreement between the Union Comp. Co. and the St. L., I. M. & S. R'y Co. to transship cotton, being loaded and unloaded by the Union Compress Co., for two dollars per car from that shed to the Argenta compress.
119 Q. The railroad Co. was to get two dollars for the use of their cars?
A. Yes.
Q. What was the compress company to get for their labor?
A. 13 cents per 100 pounds for compression.
Q. Alone for compression, or for handling?
A. The expense incident to compression. We charged the expense of the two dollars per car was a part of our expense of conducting the business. Our gross revenue was 13 cents per 100 pounds on the cotton.
Q. Do you know anything about whether there were any other places or points for receiving cotton for shipment by the Iron Mountain road in this city?
A. Well, not as a general thing. They had received some down at the depot, near the bridge.
Q. How many bales?
A. I only personally know of 50 bales shipped by our firm.
120 Q. Do you know whether that was by special arrangement or not?
A. It was by special arrangement.
Q. Do you remember how many bales of cotton were shipped from that shed during the season up to the time of the fire?
A. No, sir; I don't.
Q. Do you know about how many, Mr. Smith? Will your books show it?
A. The compress books would show it.
Q. Have you got access to them, so that you can get that amount?
A. Yes—that is, the president can give you the information. I think he has a daily report showing the total received there.
Q. We can get that?
A. Yes.

Cross-examination:

Q. You stated awhile ago that it was the understanding of
121 cotton buyers that they were not to send the cotton there until it was ready for shipment. I find by looking over the receipts of the compress company for the cotton in controversy in this cause that it was delivered more than a month before the fire occurred. Can you explain how it was that it accumulated to such an extent with that agreement in existence that you refer to?

A. Well, the agreement was not carried out by the buyers.

Q. They had some cotton that they wanted to go, and it all went together, did it?

A. Yes.

Q. That understanding was violated?

A. Yes.

Q. Now, these bills of lading, to go back a little—the owner of the cotton, you say, would take it to the compress, surrender it, and get this receipt?

A. Yes; the transfer company would.

122 Q. Now, it was customary for the owners of the cotton to take that b. l. and insure that cotton themselves?

A. Yes; when the b. l. was issued.

Q. Who was in charge of the shed and ground down there, Mr. Smith?

A. Sup't, Mr. Bland.

Q. Did the railroad company have any control or possession there?

A. No, sir.

Q. They had no right to go there and direct how matters should be conducted?

A. No, sir.

Q. You were asked awhile ago about the crowded condition of the compress in the fall of 1887. I wish you would state to the jury all the causes which contributed to produce the blockade that season, whether there was anything besides the alleged shortness of transportation.

A. In the season of 1887 the cotton crop came from three weeks to a month previous to any year, and the movement was very
123 rapid and very large; the month of September received 650 thousand bales of cotton as against 350 thousand the previous year. The month of October was excessive, and there was an unusually rapid movement of the crop. So far as other reasons for not moving the cotton at the shed here, the reasons given on one or two occasions when requests were made for cars were that the lumbermen were raising Cain about the shortness of cars; that the company was obliged to attempt at least to accommodate all parties, and they always promised to give us cars as rapidly as they could. I do not know of any other reasons.

Q. Was there any such blockade in any previous year, Mr. Smith?

A. Not as great as that.

Redirect examination:

Q. Mr. Smith, had there been no blockade until then?
124 Hadn't there been a blockade previous years?

A. Yes; there has been more or less blockade there every year since I have known it. The movement of the cotton from there is slow.

Q. Did I understand you to say in your examination-in-chief that there was a contract to furnish cars to take all the cotton received there?

A. Yes, sir.

Recross-examination:

Q. You mentioned that the defendant paid 13 cents per hundred for compression of cotton when it was to — shipped by them?

A. Yes.

Q. The Memphis & Little Rock R. R. had the same arrangement?

A. Yes.

Q. You were asked if there was any previous blockade. Nothing like this, was it?

A. No; nothing like this.

125 Q. There has never been any serious shortage?

A. Nothing serious; no, sir.

S. W. TUCKER testified for plaintiff:

Q. You live here, I believe?

A. Yes, sir.

Q. You are connected with the Little Rock & Memphis R. R.?

A. Yes.

Q. How long have you been connected with that road and succeeding companies?

A. About 15 years.

Q. Did your R. R. (the Little Rock & Memphis road) have any track that run along in front of this compress shed?

A. No, sir.

Q. Was it your custom, when tickets were brought to your office issued by the Union Compress Co., to issue bills — lading upon them?

A. Yes, sir.

Q. What was done with the cotton then?

126 A. Immediately notice was sent to the Union Comp. Co. that we had issued bills — lading, giving the marks and ordering the cotton out, and then getting the transportation for the cotton.

Q. Was any insurance made generally upon the cotton for the benefit of the R. R.?

A. Yes, sir.

Q. State whether in Sept. or Oct. or Nov. cotton accumulated there in the cotton compress shed of the Union Comp. Co., and to what extent.

A. Well, sir, we signed a great many receipts for cotton there, and they were finally blocked up. I think, on account of not getting

the cars for the transfer of the cotton from the compress from the Little Rock platforms to the Argenta compress, transportation was not furnished, and the cotton that we had signed for was delayed from four to five weeks, and finally one or two shipments of
127 cotton, 500 or 1,000 bales. The people owning the cotton, rather than have it get in there and get tied up, paid an extra transfer of 2½c., and we hauled the cotton from our depot over. That was the condition about that time.

Q. They hauled it from the blockade down to your depot?

A. They made the delivery and we hauled the cotton to the Argenta compress.

Q. That was cotton which had been billed by your route?

A. It was cotton that we had contracted for.

Q. Was cotton of your company burned at that fire?

A. Yes.

Q. Did the company have to pay for it?

A. Yes. I think the claim has been settled.

Q. How many bales did your company have there at the compress shed at the time of the fire?

128 A. About 1,200 bales. We lost about 1,200 bales at that fire.

Q. How long had it been there—the longest I mean?

A. Some of it had been there 5 weeks; had not been transferred. The most of the cotton, which had been there 4 or 5 weeks, was all uncompressed. We were waiting for cars. Of course, we had no rights. We could not get it out. We had to wait on the Iron Mountain road to make the transfer.

Q. Where was it compressed?

A. There was a good deal of compressed cotton that had been compressed right there at the foot of Main street.

Q. Had it been compressed right on the ground?

A. Yes.

Q. Cotton which had been billed by your railroad?

A. Yes, sir.

Q. Do you know whether any complaints were made to the officers of the Iron Mountain road about this blockade
129 of cotton?

A. I cannot say that I know of any, except that I know there was a great movement made by the Union Compress Co. to get cars to relieve the blockade that occurred at the foot of Main street.

Q. Was it a dry time just before the fire?

A. Yes.

Q. Do you know whether the Iron Mountain road continued to bill cotton up to the time the fire took place?

A. Well, I don't know. I know that the cotton—no, sir; I don't know.

Cross-examination:

Q. Where was this compressed cotton that you speak of that you had issued bills of lading for? When and where was it compressed?

A. Before they moved the compress.
Q. That was in June?
A. Yes, sir.
130 Q. Had there been a blockade, then, all that time from June up?
A. The cotton had not been moved; parts of shipments were still in there.
Q. What do you mean by parts of shipments?
A. I mean there was 20 or 30 bales in the shipments. Some of it had been compressed and gone, and some of it was in back there. It was covered over by uncompressed cotton.
Q. The compress company were shipping their cotton on top of it and leaving this there?
A. Yes.
Q. And if it had been in a different situation, then, on the platform it would have been then shipped out earlier, would it not?
A. I cannot say. I know that the cotton we had in there was very much delayed.
Q. It was broken lots, was it not?
A. Yes; most of the cotton had gone forward.
131 Q. How much was there of that, Mr. Tucker? Give me an idea, if you can.
A. I cannot say.
Q. Was there over 50 bales?
A. I cannot say.
Q. What time did you issue bills of lading for it?
A. We had some cotton in there about 5 or 6 weeks.
Q. And it was old cotton which had been compressed by the old compress?
A. Yes, sir.

Redirect examination:

Q. How was your office situated with regard to this cotton?
A. How do you mean?
Q. Could you see the cotton?
A. Yes, sir; I could look right down on it.

C. F. MARTIN testified for plaintiff:

Q. In 1887 where did you reside and what was your business?
A. In Little Rock; cotton buyer.
132 Q. Where was your place of business?
A. Between Elm street and the river on the east side and on the west side of Scott street—east and west of Scott street.
Q. How long had you been there engaged in business?
A. I think about 13 years.
Q. Were you acquainted with the cotton sheds and warehouses of the Union Compress Co. on Main street?
A. I superintended the erection of the Merchants' & Planters' warehouse.
Q. State to the jury which side of the street that was.

A. The Merchants' & Planters' warehouse was 140 x 200, lying between Elm street and what was originally Water street.

Q. (Showing plat.) Who drew this?

A. I did.

Q. You drew it yourself?

A. Yes, sir.

(Plat offered; the same plat described and alluded to by Capt. W. H. Wright.)

133 Q. How high was the platform, about the height*h* of car?

A. Yes; just about on a level with them. The upper floor was about the height*h* of the car—lower, perhaps—about on a line.

Q. Do you know how that cotton was stored there?

A. The uncompressed cotton was kept upstairs on both sides and in Main street. The lower floor of the compress was devoted to the cotton which had been compressed during the stay of the machinery there.

Q. Now, state to the jury whether or not there was any cotton on Main street and to what extent.

A. Main street was pretty well filled to about the center of this (pointing it out on the plat).

Q. Could you estimate the number of bales there was in the street?

A. No, sir; I have no idea. The street was filled with them.

134 Q. How high?

A. They were all on their heads.

Q. Were there any bales that were on top of each other?

A. They were all standing on their heads.

Q. In shape, were they?

A. They were uncompressed.

Q. Covered tight?

A. They were uncompressed.

Q. Well, was there any cotton exposed?

A. The cotton is exposed in every bale.

Q. But those bales there, I mean. Tell the jury how the cotton was exposed.

A. All uncompressed cottons are subject to examination by the buyer. The manner of sampling is to cut from what is known as the "bulge" of cotton, from which you draw your sample, and then for the purpose of examination it is cut diagonally from the head of each bale, and that was about the condition; there was a

135 cut on both heads, and that is about the condition that all cottons are carried to the compress. The compress always fixed those places with the side cloths taken away from the cotton.

Q. Did those bales in the street have the cotton exposed?

A. Yes, sir; necessarily.

Q. Do you know whether there was any stray cotton in the streets; I mean loose cotton?

A. I cannot say as to that; it would be almost impossible to handle cotton in that condition without loosing some of it, though as

a rule the compress people are very careful to take care of those fallen parts.

Q. Down how near to the track was this cotton piled in this way; to the railroad track I mean?

A. Well, on the lower floor there might have been room enough for a man to pass around the cotton; it was zigzag; it was
136 not piled with any great care or with any great regularity. In some places it might have been the width of enough room for a truck to run along and take up the cotton. Generally when they compressed they utilized all the space they had.

Q. These stairs that you speak of as you left that corner of Elm street by Hornibrook's, then you turned and went west, and then you struck a platform?

A. And then you st-uck a platform and this led to the north—to the level of the siding.

Q. Down to the track?

A. Yes, sir.

Q. How wide was that passage-way, Mr. Martin?

A. Do you mean how wide was the sidewalk?

Q. Yes.

A. Five or 6 feet.

Q. For what were they used?

A. They were used as a mode of egress and ingress to Main street.

Q. Egress to where?

137 A. People going to and from the skiff landing to the river.

Q. And for what other purposes?

A. It is a highway.

Q. How about the boat-house?

A. Of course, people coming to the boat-house had to take the same road as those coming to the skiff landing.

Q. State whether or not there was much travel at that time.

A. About as much as there is at the present day, I imagine, comparing the increase of people.

Q. Any idea how many people went that way every day?

A. The skiff man could give you an idea.

Q. Was there cotton on both sides of the stairs of which you speak?

A. Yes, sir.

Q. How near to the passage-way?

A. Jammed up against it.

Q. And did these bales have cotton exposed the same as the others?

138 A. I think not.

Q. How were they?

A. They were compressed cotton.

Q. You think they were?

A. That is, as a rule.

Q. Now you may state, Mr. Martin, whether this cotton in the streets and warehouses had any protection except as you stated.

A. None, sir, that I know of.

Q. Do you know whether it was sprinkled?
A. I do not.
Q. Did you never see it sprinkled?
A. No, sir; I never saw it sprinkled.
Q. How often did you see that cotton?
A. About every day. I was at my office all the time and along that place.
Q. Were you on the east end?
A. I was on the east end of the block.
Q. Did you know of having that cotton in the streets ever exposed?
A. No, sir.
139 Q. Where was your cotton?
A. My cotton was on both sides of Scott street—occupied a part of Scott street and some in Elm street.
Q. That was east, then, from this?
A. Directly adjoining on the east.
Q. In the same block?
A. Yes.
Q. How far was this cotton from the line of the railway from the track?
A. About 10 or 12 feet, sir.
Q. What sort of a season was it?
A. Exceedingly dry.
Q. Do you remember the day of the fire?
A. 14th November.
Q. How had it been as to being dry for some weeks before that?
A. It was so dry, sir, that the grass would ignite readily along the line.
140 Q. Know anything about parties sprinkling cotton along the line of the railroad?
A. I had my men sprinkle my cotton after the passing of every train.
Q. How many trains went by there a day?
A. I don't know; different numbers at different times, according to the demands of the business.
Q. You say upon the passage of every train at that time you required your men to spray your cotton?
A. To follow immediately after the cars and put the spray on it.
Q. Where did you obtain the water?
A. I employed Col. Zeb. Ward to put me in a plug at the corner of Markham and Scott streets and carried it back to my warehouse on the east side. I then had a long hose, so that I could spray both sides of Scott street.
141 Q. What railroad company used those tracks?
A. The St. Louis, Iron Mountain & Southern Railway Company.
Q. Now, you say it had been afire once or twice. When?
A. During this dry season.
Q. How long before the fire?

A. I think the last time that I discovered it was about three days before the fire.

Q. Where was that fire?

A. Right north on the platform, north of my warehouse that was burned down there.

Q. I mean relatively situated to the tracks of the railway?

A. About 12 feet on the level of Scott street. The platform was on a level with the street.

Q. Twelve feet south of the track?

A. No; it was about 12 feet south of the track, and I suppose 10 or 12 feet higher than the track.

Q. State whether or not it caught upon that side of it.
142 You had it piled up there in quantities?

A. It caught immediately next to the railroad.

Q. Do you know how?

A. I do not.

Q. You say that you saw this cotton upon Main street stored there by the compress Co. almost daily. Did you see parties passing to and fro upon this passage-way?

A. I do not know that I ever observed.

Cross-examination:

Q. Where was your place of business?

A. East of Merchants' & Planters' warehouse.

Q. On Scott street?

A. Both sides of Scott street.

Q. You stated yesterday that cotton next to the passage-way was compressed. I wish you would explain what you meant.

A. I stated that the cotton — was down-stairs under the
143 compress, on the lower stories, above, in front of the —, the shed below, on the platform leading across the street, underneath, and in the excavated part of the compress shed, as a rule, was compressed; that is where the compressed cotton was stored previous to shipment. As a rule and without exception, cottons on the upper stories of the compress building proper was uncompressed; it was thrown down the slideway for compression.

Q. Was the cotton on either side of the passage-way for footmen in going down the steps compressed cotton?

A. As a rule, it was, though how it was on the day of the fire I don't know; they had been shipping uncompressed cotton.

Q. How long before that fire of the compress had it been moved away?

A. I think seven months, speaking generally of the cotton
144 down-stairs.

Q. Seven months would take it back to May or June?

A. Yes, sir.

Q. You saw that cotton in that condition how long before the fire?

A. I don't remember—such a jam at the foot of Main street at the time of the fire. I think that the Union Comp. Co. utilized all the space that they had there for storing both baled cotton and

compressed cotton. I am not sure that there was one bale at the time of the fire that was compressed, though my recollection is that there were 700 bales.

A. C. STILLWELL testified for plaintiff:

Q. Are you acquainted with the location of the compress shed at the foot of Main street?

A. Yes, sir.

Q. Were you frequently about there before it burned?

145 A. Not at the compress at the time of the fire. I was in Pine Bluff.

Q. Previous to the fire?

A. I had been around Mr. Martin's cotton warehouse.

Q. In what capacity were you there?

A. I was there on two (2) or three occasions, watching for Mr. Timms, watchman.

Q. Do you know anything with reference to the fires there?

A. On one occasion Mr. Timms had been back—wind was blowing from the north. I threw a bucket of water on the cotton; several bales caught fire; we had some little trouble in putting it out.

Q. Any other times that you know of it catching fire?

A. That is the only time that I know of. I don't remember the exact date; it seems to me either Nov. or Dec., in 1886 or 1887.

Capt. WRIGHT recalled:

A. There was a strip of corrugated iron across the north side of this compress shed.

146 Q. How high?

A. I think up to the 2nd story. My recollection is that it did not come clear down to the floor except in places.

Q. In what places did it come down to the floor, do you remember?

A. There were openings left for the loading of cars.

Q. Can you get me that diagram that you spoke of, if you please?

A. Yes, sir.

(Here the plat introduced in witness'*es* first evidence was produced.)

Q. The line of this platform was inside of your lots?

A. I think so; I will have to see.

Q. Was the cotton piled down with- 18 inches of the track?

A. There was al*l*ways a gangway left.

Q. How wide?

A. Oh, 6 or 8 feet, or 10.

Q. At the time of the fire how full was this lower platform?

147 A. All full—jammed in up to this gangway.

Q. Was the cotton on the end?

A. On end, my recollection is.

Q. Was there more than one door?

A. No, sir; only one door.

Q. Place was all full?
A. Yes, sir.
Q. Did you always keep it that full?
A. We kept that space for compressed cotton when we had the compress in operation—at that time.
Q. How did you happen to use it for uncompressed cotton at that time?
A. It was the only place we had.
Q. Would you have had it that full if the cotton had been taken away promptly?
A. No; we would not have had cotton there if we had had transportation, except what might accumulate in a day or two.

Q. How many bales of cotton were probably stored there
148 at the time of the fire?

A. 500 or 1,000 bales. I think that place will hold 1,000 bales or more of compressed cotton. If so, about half that much loose cotton.
Q. All uncompressed cotton?
A. All uncompressed cotton.

Cross-examination:

Q. This is the compress building lying right back of the Dodge & Meade block and the old Metropolitan Hotel, is it not?
A. Yes.
Q. This wall here is about how high?
A. About 14 or 15 feet.
Q. Covered with a roof or not?
A. Yes.
Q. Clear over to the outer shed?
A. Yes.
Q. Was there a roof over this brick wall clear across, covering the whole of the compress building?
A. Yes.

Q. What wall was that?
149 A. Brick wall.

Q. Extended to the eaves of the roof?
A. Yes.
Q. So that the whole of that was covered with a roof and the brick wall on each side?
A. Yes.
Q. On the side next to the railroad how was the front of this—on a line with the street?
A. Yes.
Q. Corrugated iron in front?
A. No.
Q. Was there nothing around the boiler-rooms to protect them?
A. Yes; they were enclosed with brick.
Q. From here to here?
A. There was no special protection there—an open shaft.

Q. From this point to this point was there no corrugated iron wall thrown up that way with openings to load the cars on?

A. Yes, sir; it was.

Q. That was on the lower floor.

A. Yes.

150 Q. And then this iron wall extended in this way up to the second floor?

A. Yes.

Q. How far did the second floor extend over here, back this way, from Main street?

A. It came near the corner of the street. I could not tell exactly.

Q. How far did it come back this way? Did it cover the entire compress building?

A. That is my recollection.

Q. Where was the open shaft where the machinery used to be? Locate it on the plan.

—. ——.

Q. How large an opening was that, Capt. Wright?

A. It covered a space of two boilers—25 x 15 feet. We had a railway so that the cotton could not be thrown into it.

Judge ROSE:

Q. How many doors did you say there were along here?

A. A door for every car.

Q. How many cars, about?

A. I suppose 6 or 8. That would be 150 feet, probably.

151 Q. How wide were those doors?

A. Six or eight feet.

Q. Open or shut?

A. Open. I think they slided up.

Q. How high were they?

A. The height of one length of corrugated iron—was about 8 feet.

Q. Were they up or down at the time of the fire?

A. I could not tell you. I suppose they were up.

Q. Don't know anything about that?

A. No, sir. *A.* I could not say positively that that iron extended up to the corner of the street.

Q. What was the height of the upper from the lower floor?

A. 12 or 14 feet, or maybe 15.

Q. Could you tell how far the corrugated iron extended down by the diagram?

A. No; but there are persons here who ought to know.

Q. Is Mr. Apperson here?

A. Yes, sir.

152 Judge CALDWELL:

Q. In your former examination I understood you to say that the compress company received cotton at the shed at the foot of Main street for transportation to Argenta for compression.

A. Yes, sir.

Q. Under the contract between the R. R. Co. and the compress Co. was the R. R. Co. bound to haul all cotton deposited at the shed at the foot of Main street as fast as deposited or as fast as ordered by the company to the compress at Argenta?

A. Yes; that is my understanding of the contract.

Q. Did you make the contract?

A. Mr. Urquhart, who was president of the company at the time it was made.

Q. Did the R'y Co. haul any cotton from Main street to Argenta that was not billed for transportation east before it was taken from the sheds?

A. Billed it directly from the shed.

Q. Where were the through bills of lading made out?

153 A. At the company's office; all the cotton that was put there was put there for the purpose of compression. We never received the cotton for any other purpose.

Q. How did the R. R. Co. get possession of cotton to transport to Argenta?

A. We loaded it on its cars.

Q. Did you load it on the cars without having a bill of lading?

A. No, sir.

Q. Did the terms of those bills of lading—what were the terms of those bills of lading; was it a bill of lading to Argenta or——

A. A bill of lading through to destination.

Q. No bills of lading from the foot of Main street to Argenta?

A. No, sir.

Q. Railroad received cotton covered by through bills of lading?

A. Yes.

Q. To you or to the shipper?

A. To the shipper.

Q. They reserved the right to compress and taking the

154 cotton to Argenta for that purpose?

A. Yes, sir.

Judge ROSE:

Q. Is that the form used by the railroad company?

A. That is my recollection of it.

Q. You have seen them, however, haven't you?

A. Yes, sir.

Q. I think that is the blank?

A. Yes; that is my recollection of the blank.

Judge CALDWELL:

Q. You received the cotton at the foot of Main street for compression?

A. For compression.

Q. Was it understood that all compressed cotton was for shipment by rail?

A. Yes.

Q. Did you receive any that was not for shipment by rail?
A. No, sir.
Q. Was all compressed cotton to be shipped by the defendant's road?
A. By the railroad's issuing the bills of lading. Under-
155 stand now, there were other roads issuing bills of lading.
Q. One other road?
A. Yes, sir.
—. ——.
A. The railroad Co. after issuing the bills of lading would order us to ship that cotton to —.
Q. When you received the cotton at the foot of Main street it was not compressed?
A. No, sir.
Q. It was understood that the carrier would take it to Argenta for the purpose of compression?
A. Yes.
Q. They had that right?
A. Yes.
Q. The Iron Mountain road took all the cotton?
A. Yes; the other road had no track into the compress.
Q. It was understood between the compress Co. and the defendant R. R. Co. that it would take all cotton deposited at the foot of Main street for compression?
A. Yes, sir.
156 Q. It took the cotton that was deposited there for compression, as well as that that was intended to be shipped by its line as that to be shipped by the Memphis & Little Rock R. R.?
A. Yes.
Q. How did it get possession of the cotton that was to be shipped by the Memphis & Little Rock?
A. We loaded it on the bills of lading.
Q. What evidence did you get that this was for the defendant railroad Co.? You did not get its bill of lading?
A. We got the Memphis & Little Rock bill of lading.
Q. But it was understood that they would transport that cotton going over the Memphis & Little Rock—they would transport it to Argenta for compression. When you loaded a car what evidence did you have that it was for them?
A. The order of the traffic manager of the Memphis & L. R. R. R.
157 Q. You had his order to the shippers?
A. To the shippers; yes.
Q. When you loaded a car with cotton that was to be shipped to Argenta and compressed, and shipped from there by the Memphis & L. R., what evidence did you get from the Iron Mountain road that you had loaded that car?
A. (MOORE:) His own record showed it.
Q. Was there no bill lading given for the shipment of cotton from here to Argenta?
A. No.

Q. I have 100 bales of cotton for Smith & Co. that I want taken to Argenta to be compressed, and he would send you two cars and you would load the cotton on it. What would you have to show?

A. Our way-bills.

Q. But no bill of lading?

A. No, sir; we had no bill of lading.

Q. You paid 2 dollars per car for the transportation of the cotton across?

158 A. Yes, sir.

Q. At whose expense was the cotton compressed?

A. Expense of the R. R. Co.

Q. They paid the expense of compression?

A. Yes.

Q. For cotton on the Memphis & Little Rock they would pay that?

A. The Memphis & Little Rock.

Q. The Iron Mountain on its road?

A. Yes; settlements were made weekly.

Q. You did not make the contract yourself under which you were operating?

—. ——.

Q. Explain to the jury what was done with the cotton that was brought to the compress Co.

A. We issued a receipt for it to the owner.

Q. What did he do with that receipt?

A. He took the receipt to the R. R. Co.

Q. What did the railroad company do with it?

159 Q. Thereupon the railroad company issued a bill of lading to the owner of the cotton and an order to us.

Q. What was that order; is that one of the orders?

A. Yes, sir.

Q. Anything about insurance?

A. That was set out in the receipt; the contract was and the agreement was that the railroad Co. would insure all cotton as soon as we were notified that the bill of lading had been issued.

Q. What then?

A. We loaded it on the cars.

Q. Did you keep a sufficient number of hands?

A. At all times.

160 Q. You had a way bill for the cotton to be shipped by the Memphis and Little Rock road?

A. Yes, sir; for both roads.

Q. The Memphis road had no track connected with this compress in the city of Little Rock?

A. No, sir.

Q. Did it have a track connected with the compress at Argenta?

A. Yes.

Q. So that when the cotton was compressed it could be put on the Memphis cars?

A. The siding on the south side of the compress is the Memphis siding.

Q. Had separate sidings in Argenta?
A. Yes.
Q. MOORE: You stated that you got 13 cents per 100?
A. Yes, sir.
Q. That was for cotton originating here; covering insurance, handling, and compression?
A. Yes.

161 Cross-examination:

Q. You stated, I believe, that Mr. Howell made that contract in St. Louis with Mr. Newman?
A. A renewal of the old contract. Mr. Howell was authorized by the board of directors to do so.
Q. He went there in September for that purpose?
A. Yes, sir.
Q. Cotton would be brought to you by the owner—the cotton buyer?
A. Yes.
Q. When it was brought to you you would issue one of those dray tickets?
A. Yes, sir.
Q. The owner when he got ready to have the cotton billed would take it to the railroad company and get a bill of lading?
A. Yes; those receipts.
162 Q. Your warehouse receipts to the railroad company and get a bill of lading?
A. Yes, sir.
Q. Suppose the owner of the cotton did not have lots made up and classified in a way to suit him, he would not go to get a bill of lading until he had got it classified to suit him?
A. That was a matter altogether with the buyer, of course.
Q. Didn't you have some trouble with cotton buyers on that point?
A. Yes, sir.
Q. Some complaint made about cotton being held longer than you wanted it held, on the ground that you did not want to store cotton in that way until it was ready to be shipped?
A. Yes; we gave this notice, that we would receive no cotton until it was ready for shipment. We did not have the space to
163 take cotton unless it was ready to go forward.
Q. When the bill of lading was issued the railroad company would send you the notice, which was in the hands of the court a moment ago, that b. l. had been issued?
A. Yes.
Q. Do you know what the course of business was in regard to that?
A. Yes; I do know, but that was a matter with the secretary of the compress company.
Q. Didn't the railroad company put these cars off on the side track then? Didn't they load it into the cars, keep a record, take

it over there, and unload it out of the cars, compress it, and then load it back for shipment to destination?

A. Yes; according to these memorandum way-bills.

Q. Did the railroad company issue the compress company
164 way-bills for cotton loaded by them into their cars?

A. I know that as a matter of fact—that is, of the form—those way-bills were not issued to me.

Q. Wasn't the cotton loaded by your men on the cars?

A. Yes, sir.

Q. Unloaded off the cars by your men?

A. Yes.

Q. The railroad simply hitched its engines to the cars and took them to Argenta?

A. Yes.

Q. Didn't your men keep a record and not the railroad?

A. We both kept a record.

Redirect examination:

Q. What is the width of this railroad track?

A. Standard gauge, I think, 4′ 8½.″ I suppose the width of all the tracks would be 40 feet; there were three or four tracks,
165 I think. I don't know that all of them covered all of the compress front.

Q. Was there any cut there or was it level ground?

A. Level ground; there was a little trestle there.

Q. That was level?

A. Oh, yes.

Q. Do you know the distance from the south side of the boat-house to the north end of your platform?

A. I would say——

HENRY LEE recalled for plaintiff:

Q. Do you know anything about that compress? What do you know about it? If you know anything tell the jury.

A. People passing, coming along down the stairway, would be smoking occasionally. As a general thing, in coming into the compress there is no smoking allowed in there, sir.

Q. In passing up and down?

166 A. Well, the stairway, yes; people would be smoking crossing the river or something.

Q. Was there much passing over the river at that time by skiff?

A. Not after that bridge got up there; there is not much since then.

Q. How many skiffs at that time?

A. 4 or 5.

Q. Were they kept busy or not?

A. I could not tell you exactly. I was at work and did not keep notice.

Q. Did you tell anybody there not to smoke—forbid them smoking?

A. Yes; men walking out where the cotton was on the platform, I would tell them that it was not allowed around the cotton, and a

good many of them would say, All right, sir, and they would go back or else put the cigar out.

Q. What did some others say?

A. About all, I think, they would go back or put the cigar out.

167 SAM. PRYOR testified for plaintiff:

Q. What business were you engaged in in the fall of 1887?

A. Working at the compress down on the river.

Q. Do you remember and can you state to the jury whether you saw people smoking coming to and from the skiff landing and the boat-house?

A. Yes, sir.

Q. Was that frequently?

A. Frequently.

Q. Did you forbid them smoking?

A. No, sir; not on the public gangway.

Q. No; you didn't?

A. No, sir. I did anywhere else about the cotton, except there.

Q. Why did you not forbid them there?

A. I had no orders.

168 Q. You were watchman of the cotton compress, were you?

A. Yes, sir.

Q. You saw them frequently?

A. Yes, sir.

Q. What were they smoking?

A. Were sometimes smoking cigarettes and sometimes cigars & sometimes pipes.

THOMAS BARBER testified for plaintiff:

Q. What business were you engaged in in the fall of 1887?

A. I was running a skiff ferry back and forth from Little Rock to Argenta.

Q. Previous to the fire that occurred in the shed were you about the premises—about the Athletic landing and skiff landing?

A. Yes, sir; I was pretty close around there.

Q. How many skiffs were running across the river—regularly, I mean?

169 A. There were four skiffs running at that time.

Q. Was there much passing to and fro?

A. Yes, sir; right smart.

Q. How did they go down to the skiff landing?

A. From the front of Main street they had two gangways, one on each side of the street.

Q. Did you see people smoking when they would come from there?

A. Yes, sir; around there all the time.

Q. Any remonstrance made—that you made?

A. The company had signs all around there—no smoking allowed.

Q. Did you hear any one remonstrate with the people that were smoking?

A. I did not hear so much. I have heard some of them say they did not allow smoking around there. Some would smoke and some would not.

170 Q. What did they say?

A. Some would say nothing; would smoke if they wanted to.

Q. Do you know about ladies passing down on that gangway?

A. Ladies went along there as much as anybody else.

Q. How wide was that passage for them to go down and up?

A. There was just room enough, I think, for two to walk close together.

Q. Was there anything on both sides of it or not?

A. On both sides of the gangway?

Q. Yes.

A. On that side of the street, of course, there was a little cotton between that brick wall and that door. There was a little cotton between there and Mr. Hornibrook's, and then there was a little cotton on each side of it. When you got below that floor no cotton only on one side of the street. After you passed that

171 door, of course the cotton was up away from that side; was in the middle of the street.

Cross-examination:

Q. You say the company had signs up about smoking?

A. Yes, sir.

Redirect examination:

Q. Where were those signs?

A. Nailed up there on the posts around.

Q. Outside or inside?

A. Some of them were outside and some of them were back in the compress.

M. T. HUFF testified for plaintiff:

Q. What business were you engaged in in the fall of 1887?

A. I was running a skiff ferry.

Q. Did you see people smoking through the cotton at the foot of Main street?

A. Yes, sir.

172 Q. How often?

A. Every day.

Q. Any objection or remonstrance made to it?

A. Sometimes.

Q. Would they quit?

A. No, sir; some of them would not quit.

Q. What would they say?

A. That they had a right to smoke on the sidewalk.

G. P. C. RUMBOUGH testified for plaintiff:

Q. What is your business?

A. Civil engineer.

Q. Look at this map and see if you made it?
A. Yes, sir.
Q. What does it represent?
A. It represents the river front between Main street and Sprig street.
Q. That was drawn to a scale?
A. Yes, sir.
Q. What was the scale?
A. 50 feet to the inch.
Q. Was that correctly drawn?
173 A. Yes; I made it.
Q. What is the width of the streets of this city?
A. Generally 60 feet, except Broadway, which is 80 feet; Rector avenue from 70 to 90 feet, and in the Woodruff's Addition 60 feet.

Cross-examination:

Q. Has Water street ever been opened for travel between the county jail and Scott street?
A. It was opened at one time—I forget now, but Mr. Jones, city clerk, can tell you—until Mr. Jake Frolick captured it for the State.
Q. You are speaking of the north of the State-house?
A. Yes, sir; it was opened to Ashley—from Sping to Ashley.
Q. Where is Ashley street—immediately east of the State-house?
A. Yes.
Q. Was it passable along there for vehicles?
174 A. I don't think it has ever been.
Q. Not in condition to be used, was it?
A. I don't think it was, at the west end.
Q. Between Ashley and Scott was it ever opened for travel?
A. No, sir. You mean for vehicles?
Q. Yes.
A. No, sir.

S. W. TUCKER recalled for plaintiff:

Q. You stated that a good many bales of cotton that were waiting for the Memphis & Little Rock railway at the compress sheds had been by the railway company or the owners of the cotton hauled away from there to some place within the reach of the Memphis railway.
A. No, sir; the cotton was not delivered at that compress, but the cotton was taken direct from the factors here and delivered
175 to us at Little Rock. We hauled it over in our cars and had it compressed there.
Q. Where was it put on the cars?
A. It was put on the cars at the Little Rock depot.
Q. At the upper end of town?
A. Yes, sir.
Q. Hauled the cotton all the way to the depot rather than take it down and have it wait?
A. Yes, sir. On account of the block at the Main-street shed they

could not take the cotton there, and in order to relieve the situation and not delay this shipment, why we hauled it from our depot over to Argenta in our cars at an additional expense to us.

Q. Have you made an examination to ascertain the number of bales?

A. I have not examined any records. I think about 700 bales.

Judge CALDWELL:

Q. What 700 bales?

A. Could not be delivered at the compress on account of
176 the blockade. It was hauled over by the Memphis and Little Rock railroad.

Cross-examination:

Q. To whom did that cotton belong?

A. To one or two of the cotton men here.

Q. Do you remember their names?

A. Mr. Sam. O. Smith was one.

Q. Who else?

A. I am not positive, but I think Mr. Howell. I don't remember now; 8 or 9 men shipping with us, dividing the business up.

G. H. VAN ELTEN for plaintiff:

Q. Where do you live?

A. In Little Rock.

Q. How long have you been living here?

A. Between 12 and 15 years.

Q. What business have you been engaged in?

177 A. The lumber business.

Q. Did you have occasion within 2 or 3 years before the fire, the 14th of Nov., 1887, to ship lumber from here?

A. Yes; I have been shipping ever since I have been here.

Q. Over the Iron Mountain railroad?

A. The Iron Mountain principally.

Q. State when the first trouble began with the railroad company with regard to the transporting of lumber as well as you remember.

A. I cannot tell the year; it commenced about the time Gould got possession of the Iron Mountain road.

Q. About how many years ago?

A. Six or seven.

Q. Just state to the jury the delay there was and what was done about it; state the whole matter.

A. There was hardly ever any delay except in the fall.

178 Q. What was the extent of the delay?

A. There was more stuff than they could supply cars for. Cotton coming in naturally makes cars scarce.

Q. Did it occur more than one year?

A. Oh yes; they were scarce every year.

Q. Any remonstrance made about this state of things to the Co.?

A. Yes; there had been remonstrance made every year by the lumber men; the cotton men joined with the lumber men once.

Q. What year was that?

A. I think it was in 1887.

Q. Do you know what answer they got?

A. Got a promise of cars most always—always got promises.

Q. Do you remember Mr. Gould being down here about that matter one time and the interview with him about that?

A. Yes, sir.

179 Q. He was acting as president at that time?

A. Yes.

Q. What time was that?

A. I think it was in 1886—1885 or '6.

Q. What did he say would be done to remedy the matter?

A. He said he was not aware of such a shortage, and it should be obviated.

Q. There had always been a shortage, had there?

A. Yes, sir.

Q. How great was that shortage in 1887; how much was lumber delayed?

A. It was impossible to tell; according to the way you would get cars—get one car when you would want five.

Q. That has been the same ever since 1887?

A. Before and since. For those 2 months, Oct. and Nov. We got no help until Dec.

180 Q. Did you ever perceive that there was any particular relief afforded by the interview with Mr. Gould?

(Objection made by defendant. Overruled.)

A. They put on more cars, but not enough to help us out any. Their roads increased faster than their rolling stock—their mileage in roads. I think they put more cars on every year, but they built more road every year.

Q. Did the increase have any effect upon relieving the market at this place.

A. None perceptible; I don't think it had.

Cross-examination:

Q. What reason do you say was given by the R. R. for their failure to furnish transportation in Oct. & Nov.?

A. It was very hard to get a reason out of them.

181 Q. You said that their excuse was that the cars were engaged in hauling cotton.

A. No; I said that probably the cars were being used for that purpose.

Q. Wasn't it true that the scarcity of cars in Oct. and Nov. was on account of the movement of cotton?

A. I suppose it was, a great deal. One fall it was on account of moving ties a great deal—building new railroad.

Q. When is the bulk of the cotton crop moved?

A. I suppose in Oct. and Nov.

Q. Fall and winter?
A. Yes, sir.

When the testimony of G. H. Van Etten was given and at the time the defendant, by its counsel, excepted to all that part of the testimony relating to the block on the defendant's railroad during the years '86 and '87, wherein there was a delay in the ship-
182 ment of lumber, for the reason that said evidence was incompetent, irrelevant, and immaterial; but the court overruled said objection and permitted the same to go to the jury; whereupon defendant saved its exceptions then and there by its counsel.

C. E. FERGUSON testified for plaintiff:

Q. What is your business?
A. I am in the lumber business.
Q. How long have you been engaged in that business here?
A. 7 years.
Q. Were you in the lumber business in the fall of 1887 and for several years previously?
A. Yes, sir.
Q. Were you acquainted with the shipping facilities furnished by the Iron Mountain road in the fall of 1887 and a year or two previous to that time?
183 A. Well, as far as that concerned my own business, I was; yes.
Q. What were the facilities afforded by the Iron Mountain road for shipping purposes—sufficient or insufficient?
A. Insufficient along at the fall of the year.

(Objected to by defendant.)

The defendant, at the proper time and in the proper manner, objected to all of the above testimony of C. E. Ferguson as incompetent, irrelevant, and immaterial; but the same being overruled by the court, defendant then and there saved its exceptions.

L. W. COY testified for plaintiff:

Q. What business were you engaged in in 1887?
A. In the First National Bank; also in the lumber business.
Q. How long had you been engaged in the lumber business at that time?
184 A. About 4 years, I think.
Q. Did you have occasion to know the facilities provided by the Iron Mountain road for the shipment of lumber and cotton and other commodities?
A. As far as lumber was concerned, yes, sir.
Q. What were the facilities—sufficient or insufficient?

(Objected to by defendant; exception reserved.)

Q. When was the scarcity?
A. Always—every year.
Q. What months?
A. In the fall trade—Sept. & Oct.

Q. On what road, Mr. Coy?
A. More or less on all the roads.
Q. How was it on the Iron Mountain road?
A. There was always a scarcity in the fall; so much so that it was a matter of public notoriety.
Q. Did you hear any complaint by the cotton men?
A. It was understood.

(Objected to by defendant.)

185 Q. Did you with any others approach any officials of the road about the shortage in cars?
A. We had an organization at that time which, I think, attended to that business. As near as I remember, suppose I acted with the rest.
Q. Did you talk with any of the officials or hear anybody else talk in their presence?
A. I did myself, no doubt, more or less; I don't know how much. I know it was a common thing to see them and try and get more cars.

The defendant, at the proper time and in the proper manner, objected to all of the above testimony of L. W. Coy as incompetent, irrelevant, and immaterial; but the same being overruled by the court, defendant then and there saved its exceptions.

J. H. TRUMP testified for plaintiff:

186 Q. What is your business now?
A. Wholesale lumber.
Q. What were you engaged in in 1887?
A. Secretary for the J. H. Bratt Lumber Co.
Q. Where was it located?
A. At Malvern, this State.
Q. Were you connected with any other organization that had under its supervision any shipping business?
A. Yes; I was secretary for the Ark. Lumbermen's Association.
Q. Do you remember and can you relate to the jury the facilities afforded by the I. M. road for the commodities in this State along those years?
—. ——.
Q. Now, what kind of commodities? Do you know anything about cotton?
A. No, sir, except in a general way. The supply of cars in 1886, for the months of Sept. to Jan'y, was almost nothing; possibly the whole averaged less than one-fourth of the necessities. In
187 1887 our average was, until about the 20th of Nov., a little less than one-fourth. From the first of Sept. to the first week in Dec. they could furnish only one-fourth of the necessary cars to move lumber.
Q. Were there complaints made about this?
A. Yes, sir.
Q. To whom?

A. Complaints were made by the association in 1886. They were made to Mr. Kerrigan and Mr. Clark.

Q. Who were they?

A. Officials of the Mo. Pac. Mr. Kerrigan was gen'l sup't and Mr. Clark manager; and the same in 1887—that is, the complaints were made by individuals, but speaking as the ass'n.

Q. Now, were you present when those individuals made those complaints?

A. No, sir.

Q. How do you know, then?

188 A. From the reports.

Q. Did you, as an individual, make any complaints?

A. We made complaints.

Q. What year did you make complaints?

A. In 1886 and 1887.

Q. What was the excess of lumber in 1887 over 1886, if any?

A. A small increase of 1887 over 1886. It was pretty heavy earlier in the season and in the early part of the year.

Q. Did you have any personal conversation and make any personal statement, or were you present when others made them, to the officials of that road concerning the increase in business and the necessity for an increase of shipping facilities?

A. Yes, sir. I was present when the officers and executive committee of our ass'n met Mr. Gould, Mr. Clark, Mr. Kerrigan, and Mr. Newman.

189 Q. Where did they meet them?

A. At Mr. Gould's car, at the Union depot here.

Q. Was it at the Union depot or at the river front?

A. On the river front.

Q. When was that?

A. About Jan'y 15, 1887.

Q. What information was given to the officials of that road with reference to the increased traffic on the road, and was it talked of?

A. It was talked over. I do not remember the exact figures of the estimated increase, but it was a very large increase over the previous years.

Q. To whom was that given and by whom? Who solicited the information?

A. Mr. Gould, to my recollection, more directly asked for the information.

Q. Of whom?

A. Of members of the association, gentlemen present.

190 Q. Was the information given to him in detail?

—. ——.

Q. In a verbal manner?

A. Yes, sir; as far as I recollect.

Q. Was any inquiry made by Mr. Gould?

(Objected to by defendant.)

Q. Was any information given to Mr. Gould by any of its officials with reference to that subject?

A. Yes, sir. Mr. Newman gave him an outline of the increase in the lumber business for the year 1886, and his estimates of what it was likely to be for the year 1887 and subsequent years.

Q. Do you remember whether or not Mr. Newman's estimate ran back of 1886?

A. My impression is that he spoke also of 1885 in comparison with the increase, but I am not positive.

Q. Do you know what the increase of local business was for
191 several years previous to 1887, one year after another—what percentage of increase?

A. No, sir; I could not give you the percentage. The increase for 1884, '5, '6 was very large. Previous to 1886 the shipments of yellow pine lumber were very small. Business pushed forward during 1884, 1885, & '6.

Q. Was that an immediate increase or gradual increase?

A. It was gradual through those years; probably a larger increase, I suppose, in 1885–'6 than in the others.

Q. Who was Mr. Newman?

A. Traffic manager of the Mo. Pac. R. R. Co.

Q. Any other official position?

A. One of the vice-presidents. I do not know which No.

Q. You say the increase in 1887 was slight. Do you — about what that increase was?

A. No, sir; I could not give you anything like accurate figures.

192 Q. Do you know what percentage it was as compared with 1885 or 1886—greater or less?

A. It was smaller—increase in percentage over 1886 than 1886 was over 1885.

Q. Demands were made of the railway officials for a supply of cars. What response did they meet with?

A. Promises of giving us more all the while.

Q. Did they do it?

A. No, sir; they would give us more for a week. When Mr. Clark made positive promises they would give us more for a week or ten days and then fall back again.

(Objected to by defendant.)

Cross-examination:

Q. What lumber Co. do you represent?

A. I am secretary of the J. A. Bratt Lumber Co.

Q. Where do they do business?

A. At Melvern. This correspondence was as secretary of
193 the Arkansas Lumbermen's Ass'n.

Q. How much business did the Bratt Lumber Co. do in the year 1886?

A. My recollection is they shipped a fraction under 1,000 cars.

Q. How much did they do in 1887?

A. I think a fraction under 1,100 cars.

Q. Where did they ship the most of it to?

A. Largely to Omaha.

Q. By what route did it come out?

A. It came out north on the Iron Mountain, on the Mo. Pac. system.

Q. What season were those shipments made in?

A. Our trade would be about equal every month in the year if we had transportation.

Q. When were you shortest in transportation?

A. In 1886—from Sept. until the first of Jan'y.

Q. How was it in 1887?

194 A. Very bad the same time—in Sept. until the early part of Dec.

To the testimony of J. H. Trump as above given the defendant, at the proper time and in the proper manner, objected to said evidence going to the jury as incompetent, irrelevant, and immaterial; but the court overruled said objections, and the defendant then and there saved its exceptions.

C. F. PENZEL testified for plaintiff:

Q. What business were you engaged in in 1885, 1886, and 1887?

A. Principally in the grocery business.

Q. How long had you been engaged in it previous to those years?

A. About 20 years previous to that.

Q. Did you have any interest in connection with lumber

195 in the State?

A. I was interested in the lumber business in Kansas.

Q. Do you know what the shipping facilities offered by the Iron Mountain road were at that time—whether the facilities were sufficient or insufficient for the purposes of freight at this point?

A. Do you mean the grocery or the lumber business?

Q. I mean the lumber and the cotton business.

A. What period of time?

Q. I mean in 1886 and 1887; particularly in 1887.

A. There was a great shortage of cars in 1886 and 1887, as far as my knowledge goes, as long as I was connected with the Arkansas Lumbermen's Association, from the fall of 1886 to January, 1888. As long as I was connected with the Arkansas Lumbermen's Ass'n there was a shortage of cars, as far as I have any knowl-

196 edge.

Q. Do you know whether remonstrances were made to the officials of the road? If so, state what you know with reference to that.

A. There were communications in the fall of 1886 and a personal interview along in the fall of 1887, and some correspondence between myself as president and Mr. Clark in the fall of 1887.

Q. Who was Mr. Clark?

A. Vice-president or manager of the Mo. Pac. system, officer in St. Louis.

Cross-examination:

Q. Your interests, you say, were in Kansas?

A. Yes, sir.

Q. And the shipment of lumber?
A. From this State.
Q. Where did you make your purchases—at the mills?
197 A. Yes; at the mills principally on the Iron Mountain road, south.

JOHN FRANKLIN testified:

Q. How far was it from the edge of the railroad track?
A. About 6 or 8 or 10 feet.
Q. How far was it from the railroad to the platform?
A. Just room enough to lay the iron to run the tracks on.
Q. How long had you been sitting down there?
A. I was not sitting; I was standing.
Q. How long had you been standing?
A. Not long. I was waiting for this lady. It was our business to carry their bundles down, as they generally wanted to hold up their clothes while they were passing thro' this cotton.
Q. Did they complain about it?
198 A. Sometimes they did and sometimes they didn't.
Q. Cotton piled so close that they would get it on their dresses?
A. Yes; more or less.
Q. How long had they been piling cotton there?
A. The whole season.
Q. Was the street more or less filled all the time?
A. There was lots of cotton. These men were idle, waiting for cars to ship it.
Q. Did you know anything about people smoking up there?
A. Yes, sir; I have seen them and have heard the watchman speak to them about it, and I think have heard their answers.
Q. What did they say?
A. They said it was in the middle of the street, and they would smoke as much as they damn please; different remarks at different times, and I think I heard different watchmen speak to them.

199 Plaintiff then introduced in evidence an ordinance of the city of Little Rock in force on and prior to Nov. 14, 1887, which reads as follows:

"SEC. 596. No person shall incumber or obstruct any street, alley, or other public place by placing therein or thereon any building materials or any article or thing whatsoever without having first obtained written permission from the street commissioner, under a penalty of ten dollars for each offence, and a further penalty of five dollars for each day or part of day such incumbrance or obstruction shall continue."

Digest 1871, sec. 442.

To the introduction of said ordinance the defendant, at the proper time and in the proper manner, objected upon the ground that the same was irrelevant, incompetent, and immaterial to the issue involved; which objection was overruled by the court; to which
200 ruling the defendant, by its counsel, then and there duly excepted.

The plaintiff then introduced in evidence a proclamation by the mayor of the city of Little Rock, which is in the words as follows:

Mayor's Proclamation.

Proclamation by the mayor of Little Rock concerning the storage of cotton on the city streets and alleys.

Whereas depositing of cotton bales on the streets and alleys of the city is often a serious obstacle to travel and the proper use of the public highways, defacing the appearance of the streets, endangering adjacent property, as well as the cotton itself, from fire; and whereas the said practice seems to have become unnecessary through facilities now prepared and preparing on private property;
201 and whereas the said practice is as much in violation of the city ordinances as would be the storage on the streets of an equal quantity of hay bales and dry goods boxes:

Now, therefore, from and after this date, the storage of cotton on said streets and alleys or depositing the same thereon, save for the purpose of unloading and reloading, is forbidden, and all persons guilty of the said acts will be proceeded against according to the ordinances governing the same.

In witness whereof I hereunto affix my name this 7th day of September, 1887.

WILLIAM G. WHIPPLE,
Mayor of Little Rock.

Attest: H. C. JONES, *City Clerk.*

To the introduction of said proclamation in evidence the defendant at the proper time and in the proper manner objected,
202 because the same was incompetent, irrelevant, and immaterial, but the court overruled said objection; to which ruling the defendant, by its counsel, then and there duly *accepted*.

This was all the evidence on behalf of the plaintiff.

To sustain *to* defense defendant introduced the following testimony, viz:

A. P. HOWELL, for defendant:

Q. I believe you stated last week that you went to St. Louis in Sept. and made the arrangement with the Iron Mountain road for hauling cotton from the cotton shed at the foot of Main to the compress across the river.

A. Yes.

Q. What time in Sept.?

A. I don't remember the exact date—early part of Sept.

Q. What was the occasion of your going?

203 A. I went to represent the compress Co.

Q. Was there any particular agents' meeting?

A. Yes; there a general meeting of the freight agents of the Arkansas district; they met to make their arrangements for the coming season of business.

Q. What arrangements?
A. Freight rates.
Q. It was a general meeting of the freight agents representing the freight business of this State for the purpose of arranging rates for the business for that season?
A. Yes.
Q. Were there any other interests represented there besides the interests represented by these freight agents and the compress interests represented by you?
A. I suppose the freight agents took the entire business in the State.
Q. Were there any other compress agents present?
204 A. Yes; from Pine Bluff, Ft. Smith, and Texarkana, I think.
Q. For the purpose of arranging with regard to rates?
A. Yes.
Q. Please state what the freight business was that was transacted by that meeting of freight agents.
A. I think the freight agents met and discussed matters and decided to hear the compress men on what they wanted first.
Q. I want you to state now who your conversation was with?
A. With Mr. Newman, 3d vice-president I. M. R'y.
Q. What did you tell him that you wanted?
A. 13 cents per 100 for compression, and we wanted them to haul cotton from Little Rock to Argenta at $2 per car.
Q. What did Mr. Newman say to you in answer to your proposition?
A. I don't know that he answered right then, but before
205 we left he agreed to those figures.
Q. Try and refresh your memory. What time did he answer?
A. Before that meeting broke up.
Q. What was his answer? State it as near as you can.
A. It was that he agreed to those rates.
Q. Anything else?
A. Only about insurance.
Q. What was the agreement in regard to insurance?
A. We agreed to insure the cotton for the benefit of the R'y Cos. after bills of lading had been issued on the cotton.
Q. Is that all that occurred in regard to the matter?
A. Yes, sir.
Q. The agreement in regard to insuring the cotton, and the statement of rates for hauling cotton from Little Rock to Argenta, and also rates for compressing it, and his statement that he would
206 give you a $2 rate per car for hauling and 13 cents for compression?
A. Yes; that is all.
Q. Anything said in regard to the means and the time of transferring the cotton?
A. No, sir.

Q. You have stated about all that was said, have you?
A. Yes, sir.
Q. The arrangement was made between you and Mr. Newman?
A. Yes, sir.
Q. The Union Comp. Co. had been organized that summer—a few months before that?
A. Yes; in June.
Q. Never done business prior to that time?
A. No, sir.
Q. Never had any contract with anybody prior to the time it was organized, of course?
A. No, sir.
Q. Any reference made or anything at all said about the old Little Rock Oil and Comp. Co., the contract that had existed
207 between them and the R. R. Co.?
A. I don't remember that there was.
Q. In your arrangement with Mr. Newman, was any reference made to the arrangement previously existing between Mr. Newman and the old Little Rock Compress Co.?
A. No, sir.
Q. Had you been an officer of the old Co.?
A. No, sir.
Q. Had any connection with it?
A. None whatever; only as a dealer.
Q. No member or stockholder?
A. No, sir.

Cross-examination:

Q. At the time you went to St. Louis you knew what the course of business between the Little Rock Compress Company and the Iron Mountain road had been with reference to the transpor-
208 tation of cotton for compression from the foot of Main street?
A. Yes, sir; I knew something about it.
Q. How long were you in St. Louis attending that meeting?
A. I think about 2 days.
Q. You don't remember, I suppose, the words that were spoken at that meeting?
A. No, sir; I don't remember exactly.
Q. You went there and your application was to have the cotton hauled from the compress to Argenta?
A. Yes.
Q. As the cotton came in?
A. Yes; as it was ready for shipment.
Q. Remember whether the old contract was referred to or not?
A. I don't think it was; we had about agreed on what we wanted here. We submitted it, and it was satisfactory.
Q. Don't you remember that there was a reduction in the
209 amount to be paid per 100 from 15 to 13 cents?
A. Not for that season.
Q. When was that made?
A. I think, the season before.

Q. That was made with the old oil & comp. Co.?
A. I suppose so.
Q. Were you in the cotton business before you became a director in the Union Compress Co.?
A. Yes, sir.
Q. Had it been the custom before the organization of that Co. for cotton shippers to deliver cotton here at the foot of Main street for removal to Argenta for compression?
A. Yes, sir; I think they had the machinery in Little Rock at that time.
Q. You know the terms for which the old Co. was getting the cotton transferred?
A. Not particularly; I knew about what they were. I had no business with the compress then.

210 Q. When you say that they merely made you a rate do you mean by that that they left the cotton there and took it whenever they pleased?
A. There was not anything said about that.
Q. They were to haul the cotton across from here to Argenta
A. Yes, sir.
Q. They were to furnish cars, were they?
A. Yes, sir.
Q. And you were to load them, were you?
A. Yes, sir.
Q. And unload it over there?
A. Yes, sir.
Q. And reload it when it was compressed?
A. Yes, sir.
Q. And to insure it for the benefit of the railroad company?
A. Yes; for the benefit of whom it may concern.

211 Q. How much were they to pay you for all that?
A. Thirteen cents per one hundred; didn't include the transfer, though, from here to Argenta.
Q. You mean the $2 per car was in addition to the thirteen cents?
A. Yes, sir.

212 SAM. O. SMITH testified for defendant:

Q. You stated the other day that you were the secretary of the compress company?
A. Yes, sir.
Q. And that the compress company was alone in charge at its warehouse at the foot of Main street?
A. Yes.
Q. I wish you would state how the cotton was loaded and by whom on the cars at the foot of Main street, and by whom unloaded when it arrived at the compress across the river.
A. The Union Compress Company loaded it at the foot of Main street and unloaded it at Argenta. After the cotton was compressed they loaded it again into the cars on the railroad.

Q. Did the railroad company have an agent or representative at the compress company, at its sheds at the foot of Main street?

213 A. No, sir; none whatever.

Q. Was any way-bill issued by the railroad company to the compress company for cotton that was hauled across the river?

A. None whatever.

Q. Who kept account of the cotton loaded on this side and — out on the other?

A. The compress company. They had a small book with a stub receipt. They took the number of the car, the initials of the car, and the marks and number of bales on each. They gave the slip to the yard-master or the person who pulled the train out. He delivered it to the Union Compress Company, showing what the contents of the car was.

Q. You had a man that would take a list of the bales put in the car, and he would give that to the man who took it across and ask him to give it to the agent of the compress at Argenta, and

214 that man would check it by the list made by the agent of the compress company at the foot of Main street?

A. Yes; that is correct.

Q. The railroad simply furnished cars and an engine to haul the cars?

A. Yes, sir.

Q. State whether any distinction was made in the loading of cars between the cotton to be carried by the Iron Mountain and the cotton to be carried by the Memphis road, or whether it was loaded together.

A. No distinction was made, sir.

Q. One car would contain cotton for both roads?

A. It could have done so.

Q. Wasn't it the habit just to roll it in?

A. That is my understanding of it.

Q. I wish you to state in regard to the character of the season. State if you have any means of knowing the increase in the

215 receipts of cotton at the time this fire occurred, as between that year and other years just previous.

A. The increase of receipts at Little Rock from the first day of September up to and including the 14th day of November, 1887, were about 6,000 bales in excess of any previous year.

Q. And what was it generally throughout the country?

A. At the ports of the United States, in round numbers, 475,000 bales increase.

Q. Was there the same relative increase at the stations along the railroads through the State?

A. I presume there was. Every point at which a record was kept shows a large increase.

Q. And not only throughout the State, but throughout the entire South?

A. Yes, sir; on account of the early maturity of the crop.

Cross-examination:

216 Q. You say the railroad company had no interest in the compress company?

A. No, sir.

Q. At no time?

A. No, sir.

Q. Did they have an agent over at the compress company?

A. We had a joint agent over at Argenta.

Q. What was his business?

A. To load the cotton, after compression, into the cars for shipment.

Q. What did you call him?

A. Loading clerk.

Q. The compress company paid one-half his wages and the Iron Mountain the other half?

A. That is about the way it was; yes, sir.

Q. There were about 6,000 more bales of cotton received here that year than had been received any previous year. Where was the cotton received here in 1887 shipped from to this point?

217 Where was the stock of cotton that was here shipped from into here?

A. Well, it came from wagons.

Q. Where was it when the bills of lading were given?

A. In the sheds at Main street and partially at Argenta.

Q. I am talking about that at Little Rock, not at Argenta. What was the number of bales received here up to the 14th of November, 1887?

A. About 35,000 bales, I think, by the exchange records, up to and including the 14th of November.

Q. Where was that principally received? Wasn't it at the compress shed at the foot of Main street?

A. Yes, sir—that is, after the cotton was marketed here, purchased by the buyers, it was generally carried to the shed at the foot of Main street.

Q. Wasn't it all carried there except some fifty or sixty bales of it?

218 A. No, sir. The Memphis and Little Rock road must have taken 1,200 bales. I think they took about 900 from us a few days before the fire.

Q. Why did they do it?

A. The shed at Main street, after the 3d of November, received very little cotton; they were clogged, and this cotton was for very prompt shipment, and we had to ship it under contract, and they had allowed us to put in, I think, between 300 and 400 — there five or six days before the fire, and furnished cars for us to load it in, on account of its being a prompt shipment. The remainder of the shipment we carried to the Memphis and Little Rock road.

Q. How many bales did you say?

A. I think about eight hundred or nine hundred bales—that is, the transfer company took it to the lower depot in place of Main street.

Q. Where was it from?

A. From our yard.

219 Q. Owing to the fact that you could not get cars to take it off from the Iron Mountain road?

A. Yes, sir; they furnished all they could, which was six or eight. We gave them enough to load them, and the remainder we took to the Memphis road.

Q. How many bales were received elsewhere in this city by the Iron Mountain road?

A. Only about fifty that I know of.

Q. How many bales cotton shipped in 1886, up to the 14th day of November, do you know?

A. Yes; I can tell you; 2,853 bales.

Q. Up to what time?

A. Up to the 14th of November, 1886, from the first of September.

Q. Did it become known early in September that the cotton was maturing very rapidly?

A. Yes, sir.

Q. Everybody know it was coming in unusually fast?

220 A. Yes, sir; during the month of September.

Q. Same in October?

A. Yes; but not in the same rate of increase.

Q. But the facts were well known?

A. Yes.

Q. Can you give me the receipts for September, 1886?

A. No, sir; I have not got them. I consolidated my statement.

Q. Have you got the receipts for September, 1887?

A. No, sir.

Q. I understood you to say that the rate- of increase during October and November were not so rapid as during September?

A. I can give you an idea from the port statements. It has been in the same ratio.

JOHN G. FLETCHER testified for defendant:

Q. What business were you engaged in in 1887?

A. Cotton principally.

221 Q. How long have you been engaged in it?

A. Twenty years or more.

Q. State to the jury how the cotton season, as to advancement, as to the early gathering and marketing of the cotton crop in that year, compared with previous years.

A. That was a dry fall. Cotton opened very rapidly and was moved very rapidly.

Q. About how much difference in the season, up to the middle of November?

A. It was generally considered about three weeks earlier than usual.

Q. Was it considered an extraordinary season?

A. It was; yes.

Q. About three weeks earlier than usual?

A. That was the estimate.

Q. All over the State?
A. Yes.
Q. Had you ever known of such a rush prior to that?
222 A. I don't think I had. Receipts were enormous here, and freights were hard to get at that time.

Cross-examination:

Q. Did the cotton crop mature earlier than usual that year?
A. Yes; I think it did.
Q. It soon became apparent that it was going to be an early crop?
A. Yes.
Q. Pretty well known by the middle of September?
A. Yes.
Q. Came in very early and very generally?
A. Yes.

ASA R. BRAGG:

Q. What was your connection with the Iron Mountain road in the fall of 1887?
A. I was division freight agent at Little Rock.
Q. Are you acquainted with the Union Compress Company,
223 with its warehouse at the foot of Main street?
A. Yes, sir; I think I was, to a certain extent.
Q. Who was in charge and control of the cotton sheds at the foot of Main street in the fall of 1887?
A. The Union Compress Company, as far as my knowledge extends.
Q. Were you in charge of the freight business of the Iron Mountain road here at that point?
A. I was their contracting agent.
Q. Did your company have any agent stationed at that place, or have any control over the cotton that was stored at that place?
A. None whatever.
Q. State whether way-bills were given by the railroad company to the compress company for cotton that crossed the river to the compress, under the arrangement between the compress company and the railroad company. State the mode of business in regard to that.
224 A. No, sir; not what we term in railroad parlance a way-bill.
Q. State what the course of business was.
A. The usual procedure there was, when the shipper presented the Union Compress Company's receipt they were taken up and the railroad company's b. l. issued in lieu thereof. Immediately upon issuing this bill of lading we sent a notice to the Union Compress Company advising them that we had issued bill lading on their receipt for the specified number of bales of cotton, giving the mark and giving the name of the party that presented the receipt that was sent to the compress company, and on that was stated to be loaded for shipment over the Iron Mountain road.

Q. Is this the receipt referred to, issued by the compress company?

225 A. Yes; this is the form.

(The receipt was then read in evidence, as follows:)

"LITTLE ROCK, 11, 10, 1887.

Received by the Union Compress Co. from —— ——.
Account of S., O. S. & Co.
For compression.
Storage after ten days will be charged.
Not responsible for any loss by fire.

Marks.	No. bales.
P. I. G.	(11.)

G. R. BLAND,
Per BREEN.
(11.)

Bill of lading issued on receipt No. —, date —— 188–.
A. R. BRAGG, *D. P. A.*

Q. Did I understand you to say that when the owner of the cotton brought that to the railroad company a bill of lading was issued?

A. Yes, sir.

Q. After the bill of lading was issued you say a notification was sent to the compress company by the railroad company?

A. Yes; that is the form of the notice.

226 (Dray ticket and shipping order made a part of the evidence.)

Q. State whether the same kind of receipt given by the compress company for cotton delivered to it at Argenta is like that which you have identified as the form of the one given at the Main-street shed?

A. The wording of the receipt is exactly the same, only a difference in the color.

Q. Was the same notification given by the railroad company?

A. Yes; the same notice.

Q. Cotton was received by the compress company at its compress in Argenta, was it?

A. Yes.

Q. What is the first notification or information that the railway company would acquire of the fact that a shipper had cotton at the compress sheds at the foot of Main street?

A. This compress company receipt was the first notice when presented.

227 Q. State what was done in regard to removing the cotton from the foot of Main street by the railroad company to the compress in Argenta after you had issued bills of lading and given

the notice to the compress company. State how the cotton was handled in your own way.

A. It was loaded by the Union Compress Company into cars for transportation to the compress at Argenta.

Q. Where were those cars?

A. On the side track.

Q. Were they set by the railroad company on the side track?

A. Yes, sir.

Q. Then they were, of course, pulled by the railroad company to Argenta?

A. Yes.

Q. What was done with it there?

A. The cars were set into the compress platform and unloaded there by the compress company.

Q. Did the railroad company give the compress company
228 any way-bill or receipt or anything of that kind for the cotton at the time they took it from the foot of Main street to the Argenta compress?

A. No, sir.

Q. At what point did the railroad company receive the cotton for shipment to its final destination after it had been compressed?

A. At the Argenta compress.

Q. Who loaded it onto the cars?

A. The Union Compress Company.

Q. Did the same rule that you refer to apply to cotton that was to be shipped to its final destination on the Memphis and Little Rock road as it did to the Iron Mountain road?

A. The rule was exactly the same.

Q. Did cotton come in more rapidly the season of 1887 than the previous one?

A. Yes.

Q. To what extent did this affect the movement of it?

A. Had the effect of crowding the depot.

229 Q. How much earlier than usual was the crop?

A. About 3 or 4 weeks earlier.

Q. State to the jury whether with the facilities had for moving cotton—if it had been an ordinary season, what the condition of affairs would have been, whether there would have been any blockade or any accumulations of cotton such as there were.

A. No, sir; if it had been an ordinary season, with the increased capacity for moving the business it would have been moved just as usual.

Q. Do you know to what extent the capacity for moving freight had been increased that fall?

A. They began to increase the car service in January or February. That was continued throughout the entire year.

Q. Can you state how many more cars there were in service at that time than the previous year?

A. Not exactly, but the Iron Mountain *pro rata*, I think,
230 was about three or four thousand cars of the increased capacity all over the system.

Q. You don't know about that? That is mere estimate?
A. No, sir; I cannot say positively.

Cross-examination:

Q. Did you have control of the shipment of cotton from here to Argenta in the fall of 1887?
A. No, sir.
Q. Did you have anything to do with furnishing the cars here in Little Rock for the transportation of cotton from the foot of Main street to the compress in Argenta?
A. No.
Q. Do you know what was really done in that matter yourself?
A. I know that the cars were furnished.
Q. When were they furnished?
A. All the time.
Q. As fast as they were required?
A. So far as I know.

231 Q. Do you know that they were furnished in sufficient quantities for the purpose of moving the cotton? Don't you know there was a blockade there?

A. No, sir; I can't say that I did know there was any particular blockade there, as far as my knowledge extends. I didn't examine the premises.
Q. Don't you know that there was a large pile of cotton in October and November piled up in the street?
A. There was cotton coming in and going out of there all the time.
Q. Do you know how many bales were billed to the Iron Mountain road at the time of the fire?
A. Yes, sir.
Q. How many?
A. You mean the number of bales at the time the fire occurred?
Q. Yes.
A. About 1,400 bales.
Q. You say there had been an increase of 3,000 or 4,000 cars on the whole system of the Iron Mountain road?

232 A. I said on the Iron Mountain proper. I mean from St. Louis to Texarkana.

Q. You stated about 1,400 bales had been billed. Wasn't it really 1,462?
A. I said probably a little more.
Q. Going back to the other matter, you say this was the whole Iron Mountain system. What was the whole Iron Mountain system?
A. I am speaking of the Iron Mountain from St. Louis to Texarkana.
Q. Didn't you say the whole system?
A. No, sir; only *pro rata*.
Q. How much?
A. About 4,000 cars. That, I think, was the increase in car service.

Q. Don't you remember that during those months of which I spoke there was a great complaint for want of cars here?

A. No, sir; not for the transportation of cotton.

Q. Hadn't there been complaint about the delay in transporting cotton in 1886, at the foot of Main street?

233 A. Not to my knowledge.

Q. Never heard of any complaint before 1887 at all, did you?

A. I had nothing to do with the movement of cars. No, sir; not under my jurisdiction.

Q. According to the stenographic report of your testimony taken in another trial, when this matter came up you were asked this question: Were you applied to as an official of the Iron Mountain road by the compress company, at different times in October and November, 1887, to furnish cars? Then this question was asked you: Did any one make complaint to you of insufficient transportation from there? The answer is: I have heard a complaint that the cars are not furnished as promptly as they might be. Is that a correct statement of the facts?

A. I didn't say shortage of cars for cotton.

234 Q. Shortage of cars generally. What kind of cars was the complaint about, then?

A. We had some little complaint from the lumber men.

Q. There might have been a good deal of complaint about the cotton and you never known it?

A. Yes; there might have been to the superintendent of transportation.

Q. The railroad company and the compress company had an agent over at Argenta for the purpose of reloading the cotton, had they not?

A. No, sir; they have no agent.

Q. An employee?

A. There was a loading clerk there who was under the supervision of the compress company. The railroad company assured a portion of his salary for loading cotton—loading at Argenta and in transit.

235 Q. If you had nothing to do with this particular work of transportation, how do you know what they had?

A. Because I have filled the local agent's office myself, and I know that no such arrangements were carried on.

Q. Did you ever go with a load of cotton from the foot of Main street to Argenta?

A. No.

Q. Had nothing to do with that at all?

A. No; I had no occasion to go over.

Q. When the owners of the cotton came to the railroad company to get cotton billed through, what did they bring with them?

A. This receipt.

Q. And upon that you issued bills of lading?

A. Yes, sir.

Q. And then you kept this receipt, I suppose?

A. They were cancelled; yes; at that time they were kept.

236 Q. Were they preserved for settlement with the compress company?

A. No, sir; they were taken up because we had issued a receipt in exchange for them.

Q. How much of the crop of 1887 that was shipped on the Iron Mountain was received at the foot of Main street?

A. None of it.

Q. I want to ask what portion of the cotton was billed at the foot of Main street? How much of it was received at the foot of Main street and how much at the other depot?

A. I could not tell you the number of bales.

Q. Don't you know that all except a small part of the bales was received at the foot of Main street? I think most of the cotton you issued bills of lading for was there.

A. No, sir; there was a great portion of it. Those red receipts was in the Argenta compress.

237 Q. Don't you know that nearly all of it was shipped from the foot of Main street, in Little Rock?

A. Nearly all we issued bills of lading on was at the foot of Main street—that is, that I issued bills of lading on.

Q. Where did they bring the empty cars from usually to the siding here at the foot of Main street for the reception of cotton?

A. All over the yard.

Q. Where is the yard?

A. The yard extends from the Ft. Smith crossing, east and west, a distance down to where the compress of the Union compress is.

Q. How were the cars hauled over from the foot of Main street—by switch-engine?

A. I suppose they were.

Q. Was a switch-engine used only for that purpose?

A. A switch-engine does all kinds of work.

Q. Where did it cross—at the upper or the lower bridge?

A. I could not say, sir; I don't know.

238 Redirect examination:

Q. You say there were some complaints from the lumbermen that fall in regard to the shortage of cars. Do you know any reason why their cars were short?

A. Yes, sir; the cars at that time were nearly all being used in the transportation of cotton.

Q. Were you giving the cotton the preference over the lumber?

A. Yes, sir; we had to do it.

Q. And that was the reason of the shortage?

A. Yes.

Recross-examination:

Q. Have you not a list of the bills of lading and the dates of shipment?

A. Yes.

Q. Whereabouts?

A. In my office, I think.
Q. Can you furnish a copy?
A. Yes, sir.

(This statement never was furnished.)

Q. Did they continue to issue bills of lading down to the day of the fire?

239 A. Yes; I think there was one issued on the day of the fire. There was over 1,400 bales burned upon which the Iron Mountain had issued bills of lading. All of the bills of lading for this 1,400 bales had been issued subsequent to October 20th and between November 1st and the fire. There was 1,100 bales of this cotton for which bills had been issued during November; so that there was only 500 bales burned upon which bills of lading had been issued between the 20th of October and the 1st of November.

Here the defendant introduced ten or fifteen witnesses tending to show that the fire occurred at about half past four p. m. on the 14th of November, and that none of the defendant's trains or engines had passed along that track for three hours prior to the fire, and that the fire was not set out or created by reason of any spark

240 or negligence in that regard on the part of the railway company defendant and its employés or defects growing out of any of its machinery. The testimony, being voluminous, is not given.

W. C. DOTTERER testified for defendant:

Q. What was your business at the time of the fire at the foot of Main street?
A. I was local freight agent of the Iron Mountain road.
Q. Where was your place of business?
A. At the foot of Rock street.
Q. Do you know where you were at the time the fire broke out?
A. In the Argenta yard; had been through the Baring Cross yard.
Q. State what the first thing was called your attention to the fire.
A. It was in passing through the Argenta yard my attention was called by the fireman of the switch-engine, Dougherty. I

241 did not locate it, though, until I was on the bridge.
Q. What did you do then?
A. I immediately came over to this side of the river to get the cars away, &c.
Q. Do you know whether or not the compress at Argenta was crowded at that time?
A. Yes, sir; the Argenta compress was very much crowded.
Q. Please state with what facility and celerity cotton carried over from the foot of Main street was unloaded at the Argenta compress?
A. Very slowly indeed. We had some eighty cars tied up in Baring Cross yard.
Q. Why were they tied up?

A. Because they could not get the cotton out of the Argenta compress in order to take more in.

Q. Were you the local freight agent?

A. I issued way-bills for freight that went out by the Iron Mountain road.

242 Q. All issued in your office?

A. Yes.

Q. Issue any bills of lading for cars from the foot of Main street to Argenta?

A. No, sir.

Q. You made out your bills at the rate of $2 per car?

A. Yes, sir.

Q. You didn't know what was in the cars?

A. No, sir.

Q. Did you give a receipt for what was in it?

A. No, sir; just switched it at $2 per car.

Q. Did the compress load the cars here and unload them across the river?

A. Yes, sir.

Cross-examination:

Q. How many cars were tied up in Argenta at the compress?

A. As near as I can recollect, about 80. The reason I have such a distinct recollection, that is what took me over the river

243 that day.

Q. Did you count them?

A. No, sir; I had reports daily. I knew the cars were there.

Q. How did you know it?

A. I may say, from personal observation; the report would show there was about 80.

Q. Were they loaded or unloaded?

A. They were loaded.

Q. Where had they been taken from?

A. Some of them had been taken from the foot of Main street; others, consigned to the compress, at various points along the line.

Q. Was the cotton compressed or uncompressed?

A. Uncompressed.

Q. Hadn't been unloaded?

A. No, sir.

Q. Why hadn't it been unloaded?

A. The Argenta compress was too crowded to take it in.

Q. Don't you know, as a matter of fact, that there was a large amount of compressed cotton lying all around, and that these

244 cars could not be carried into the proper place to be unloaded because the railroad would not carry off the compressed cotton?

A. There was considerable compressed cotton there.

Q. How many bales of compressed cotton were there over there on the ground ready for shipment?

A. I cannot say.

Q. Did you look at them—cannot you give us an estimate?

A. No, sir; I cannot.
Q. Do you know how long it had been there lying on the ground?
A. I don't know.
Q. Was the platform crowded?
A. Yes, sir.

Redirect examination:

Q. You are in the employ of whom now, Mr. Dotterer?
A. The Union Compress Company.

THOMAS BARBER testified for defendant:

245 Q. Is your name Thomas Barber?
A. Yes, sir.
Q. Where were you working at the time the fire broke out in the compress shed at the foot of Main street in the fall of 1887?
A. Sitting down-stairs on the lower platform, leaning against post.
Q. On the comprese shed?
A. Yes, sir.
Q. How far were you sitting from the steps that go down from Main street to the lower platform?
A. As near as I can guess, it was about 40 feet from those steps.
Q. In what direction, east or west?
A. West of the steps.
Q. State to the jury all you know in regard to the origin of the fire—everything you saw while you were sitttng there. Begin at the beginning.
A. I was sitting down there talking to another man—Sam. Pryor. I heard some one holler and I looked up, saw
246 it was Sam. He hollered and jumped up off the platform like I am sitting on this chair, and ran down about thirty feet and turned into a little gangway that ran in across toward the trestle and led across to the steps that you come up, and found a bale of cotton on fire, and we grabbed hold of it and threw it down, and in trying to throw it down it was jammed. There were two bales there—one on the outside; that one was rather tight. There was five bales there, three on this side and one on the outside. We pulled it down. Of course, it was burning when they had taken out a sample. In pulling down there came a little puff of wind that, striking the cotton that was loose and dry, flashed over five or six bales before you could speak, and then I told Sam. to run and holler fire, and I stayed there and tried to fight it out. A lot
247 of men working in the last shed upstairs came running down there. We tried to throw it off; we could not do it. The fire was spreading very rapidly—more east—and we ran back to get hold of a pair of hose to turn the water on.
Q. Where was that hose?
A. At the west end of the shed.
Q. State where, with reference to where the old compress machinery had been.
A. Just about twenty or thirty feet from where the old compress

had been standing. It stood west and kind of southwest, back kind of from the compress; that was where the hose was.

Q. Was there any fire in there when you went to get that hose?

A. No, sir; no fire there.

Q. What did you do with the hose?

A. We got them down, but there was so much mud it
248 blocked them up; it would not spurt any water; fire got so hot we had to go away from there; we ran down to the west corner of the compress. I think there was three or four bales there. We rolled them on the railroad track; could not do any more, the fire was so hot. We ran back to the west end, near where the compress machinery sat.

Q. You attempted to throw some cotton off there?

A. We did throw off three or four bales.

Q. How did the fire spread—rapidly?

A. I should think it did; in ten minutes the whole block was on fire.

Q. In what direction did it spread—in any particular direction?

A. It spread everywhere; went clean to the water's edge as quick as it did any other way.

249 Q. Did you see any person pass just before this fire occurred? State what you saw in that respect, who they were, and if you don't know who they were describe them.

A. Two boys who had been — the boat-house all evening came out and said something to me; I don't know what it was. One was smoking a cigarette and the other one had a cigarette in his mouth. He had not lit it yet. As the two started to go in this gangway where the cotton was set upon end I saw that one on the side next to where the bale was strike a match. Of course, where I was standing I could not see what he did, but he went in, and it was not a minute before the fire flashed out.

Q. Did you see the boy strike a match?

A. Yes, sir.

Q. You saw the other boy smoking a cigarette?

A. Yes, sir.

250 Q. Just after he struck the match came the blaze?

A. Yes, sir.

Cross-examination:

Q. You were not connected with the compress in any way?

A. No, sir; not at that time.

Q. Was it a frequent occurrence to see men smoking backwards and forwards toward that passage-way?

A. Walking just as if they were on other streets.

Q. Was it not a common thing to see people smoking, and those boys smoking at that particular time did not attract your attention, did it?

A. Of course, I knew they were smoking. Of course, I always know it was dangerous for anybody to strike matches around there. I have known them to strike matches on the bales of cotton.

Q. Right along on that passage-way?

A. Anywhere along that passage-way. I have wondered that they did not set the shed afire long ago.

Q. Did you ever see it set afire before?

A. No, sir; I never saw it set afire before, but I have heard say it had been.

Q. Heard who say it?

A. Lot of people who were working around there.

Q. Railroad folks?

A. Not railroad men; men who had been working around there.

Q. Was it a common thing to catch fire?

A. No, sir; it was not a common thing; but of course it was dangerous from the way they used fire around there. Not many people know.

Q. Can you give us some ideas of those boys? Pretty well grown, were they, or little bits of kids?

A. You might say just devilish little boys—not big and not small.

Q. Just about a good size to be devilish?

A. Yes, sir.

Q. Were they ten, twelve, fourteen, or sixteen years of age?

A. Along about twelve or thirteen.

Q. How long had you been there in the compress shed?

A. I had been there pretty close on to an hour.

Q. Had you seen an engine pass?

A. No, sir; I saw only one engine going east—that passenger train.

Q. That was the last one you saw, was it?

A. Yes, sir.

SAM PRYOR recalled for defendant:

Q. What was your employment at the time the fire occurred in the cotton at the compress sheds?

A. I was working and helping load cotton; watchman—day watchman.

Q. Where were you at the time the fire broke out?

A. I was sitting upon the cotton down on the lower platform.

Q. Who besides yourself was there?

A. No one.

Q. Was there any colored man around there?

A. Barber had been there a few minutes, but he had got out of my sight somewhere. He soon appeared again.

Q. What was the first indication you saw of the fire? Tell the jury all about where the fire caught and how it caught and all you saw of the origin of the fire.

A. It caught fire at the foot of Main street. A couple of little boys came from the boat-house smoking. One of them took the cigarette out of his mouth and threw it down at his side, and it dragged into a sample hole. The wind was blowing very strong. He hadn't got to the top of the steps before it commenced blazing.

Q. Where was that bale located?

254 A. On the right-hand side of the steps going down to go to the boat-house.

Q. On the east side of the steps?

A. Yes, sir; east side; in the street.

Q. There is a turn in the steps there, isn't there? You go down and then turn up?

A. Yes, sir; then they turned the other way.

Q. I want you to state how that bale was located with reference to the other bales. How far from the elbow that is made by the bend in the steps?

A. Well, I don't recollect exactly. It was about the third or fourth bale.

Q. Where was you standing at the time this occurred—at the time the boy you say set the cotton on fire?

A. Sitting upon a bale of cotton on the edge of the platform, about twenty feet from where the fire accurred.

Q. And you saw the boy from where you were sitting?

255 A. I could see the boy on account of the steps going down under the railroad. I could see from that.

Q. You say there were two boys?

A. Yes, sir.

Q. Do you know whether either of them had a match in his hand or not?

A. I don't know. They lit the cigarette before they came up on the platform.

Q. You didn't see one strike a match?

A. No, sir.

Q. Was the boy you refer to in front or behind?

A. They were side and side.

Q. What order did they come in before they separated on the steps?

A. One ran in front of the other, and then they went up abreast.

Q. But you say one came up the steps in front of the other and then they went up side by side.

A. They came up to the steps that way, coming upon Main street side and side towards the cotton, and then went up the steps one ahead of the other.

256 Q. Did you notice what order they came here before they got to the steps? I don't mean the steps coming up on Main street, but the steps that left the railroad track.

A. I didn't notice very particularly whether they were in front of one another. They came up playing together.

Q. What did you do, Mr. Pryor, when the cotton caught?

A. I jumped down and ran up the steps and hollered "Fire" three times.

Q. What did you do then?

A. Came back. When I got back there Barber was there, and he says, Less throw the bale over; and we caught hold of it, tried to roll it onto the railroad track; flame was so hot we could not do it. About that time the other men had come down and got the hose belonging to the Union Compress Company in the shed and turned

on the water, but, the pipe being full of mud, we could not get any water.

257 Q. Did you do anything toward attempting to put the fire out before you tried to roll the bale off?

A. No, sir; I could not do anything then.

Q. Did you see Peter Cobb there?

A. There was no one down there that I saw when the fire took fire.

Q. After you called did Peter Cobb come?

A. Yes, sir; after I had called and hollered fire.

Q. Who else besides Cobb do you remember?

A. Dick Jones and a man by the name of John Edwards.

Q. I want you to state whether there was any fire in the west end of the compress at the time this fire started.

A. No, sir.

Q. How do you know that?

A. Because I was sitting up where I could see all over the cotton.

Q. No fire in the west end?

A. No, sir.

258 Q. How long prior to the origin of the fire had it been when an engine passed there?

A. I don't hardly remember. As near as I can recollect, about an hour or hour and a half.

Q. What kind of an engine?

A. I think it was a passenger.

Q. What direction was it going in?

A. East, down the river.

Cross-examination:

Q. Where were you at the time the fire took place?

A. I was sitting right about there, on the edge of the platform, on top of the cotton.

Q. Were there several bales of cotton there?

A. Yes, sir; it was full.

Q. Where was Barber sitting?

A. Down under on the railroad. I could not see him at that time.

Q. What were you doing there?

A. Watching the cotton. I was employed by the Union Compress Company as day watchman.

259 Q. What time was your attention first called to these boys?

A. I was noticing the boys in the boat-house. They had been throwing water out of the windows onto the ground. I suppose it was some five or six minutes before they com*ing* running out of the boat-house, playing, and came to these short steps; went up to these steps side by side, and then one went up before the other.

Q. Had you seen them smoking before they came out of the building?

A. No, sir.

Q. When they came out were they smoking?

A. Only one was smoking.

Q. Were you looking at them when they went to this gangway?
A. Yes, sir.
Q. You say you saw him throw the cigarrette against the cotton?
A. He took it out of his mouth and threw his hand down, and he did not get to the top of the steps before the cotton commenced blazing. The wind made a kind of a whirlwind.

260 Q. When you saw him throw his hand down did you see the cigarette come in contact with the cotton?
A. Could not see through him; his hand was on the side opposite from me.
Q. What made it burn so quick?
A. There was a very strong wind.
Q. Was it almost immediately after the boy threw his hand down that the fire blew up?
A. Yes, sir.
Q. Did it first begin to smoke, or break out in flame at once?
A. It broke out in flame.
Q. Which direction did the flame come?
A. Right straight up; kind of whirled around and went straight up. It ran over the bagging.
Q. It ran very fast, didn't it?
A. Yes, sir.
Q. How far was it from the boat-house up to the point where the cotton took fire?

261 A. Fifty or sixty feet; maybe not so far.
Q. That street is about sixty feet wide, isn't it, Water street?
A. There is no street; only a double track between the platform and the boat-house.
Q. The boat-house not on the same side of the street as the shed?
A. No, sir.
Q. I don't believe you answered my question exactly: Whether you saw, when he threw his hand back, whether the cigarette came in contact with the cotton, did you?
A. I could not see through the boy to tell whether it did or not; there was no other way for the fire to start.
Q. He had the cigarette in his left hand?
A. Yes, sir; in his left hand as he went up, and he threw his hand down that way.

262 Q. Of course, you could not see through him to tell exactly when it struck the cotton?
A. No, sir.

Redirect examination:

Q. What part of the bale did the fire originate in?
A. At the sample hole.
Q. How long had that cotton been in that condition, piled up along there on that platform and in the street?
A. Some of it two or three days.
Q. Hadn't some of it been there a good deal longer?
A. Some of it had been there a week.
Q. How about this in the street?

A. That had been there two or three days, I guess.
Q. Wasn't it a very dry spell of weather?
A. Yes, sir; very.
Q. Wasn't it a very dry time?
A. Yes, sir; we had no rain for a long time.
Q. Was it very common during the time that this cotton
263 was piled out there for people to come down smoking?
A. Yes, sir.
Q. Ever remonstrate with anybody for smoking?
A. Not in that gangway.
Q. Had cotton in there been sampled?
A. Yes; all the cotton down on the platform had been.
Q. Was loose cotton sticking out in spots?
A. Yes, sir; a good deal of it was.
Q. How long had you been in the employ of the compress company?
A. I don't recollect what time I went; I think it was along about in last September.
Q. What business are you engaged in now?
A. Working in the compress.
Q. The same compress company?
A. Yes, sir.
Q. Wasn't these cotton bales generally covered with lint at the time?
A. No, sir; there was no lint, only lint over the bagging.
264 You see, cotton bagging when it is dry burns quicker than cotton does.
Q. The fire spread very rapidly?
A. Yes, sir.
Q. How long a time did you stay there during the day as watchman—what hours?
A. Until six in the evening.
Q. What time did you go on?
A. Seven a. m.
Q. Who stayed there at night?
A. Mr. Wright.
Q. How long before the fire had any cotton been taken out from there?
A. Three days; maybe four.
Q. How much did they take out then?
A. I don't know. I don't recollect how many cars we did load.

PETER COBB testified for defendant:

Q. Where were you working at the time of the fire in the compress at the foot of Main street in the fall of 1887?
A. At the compress—for Union Compress Company, in handling cotton.
Q. Where were you when the fire broke out?
265 A. Standing near the warehouse door—upstairs.
Q. What street did that door open on?
A. Main street.

Q. What was the first notice you had of the fire?
A. Sam. Pryor and a couple of little boys and a lady came running up Main street.
Q. How did that notify you of that?
A. They were hollering, Sam. was roaring.
Q. What was he saying?
A. He hollered fire.
Q. Where was he when he hollered fire?
A. Just come up from the fire—down the steps to first floor.
Q. What did you do?
A. I ran down there.
Q. Tell the jury what the condition of things, where the fire was, and to what extent burning.
A. When I got down there there seemed to be two or three bales of cotton on fire.

Q. Where were these bales located?
266 A. On the right-hand side coming down the steps, in the street.

Q. What did you do when you got down there?
A. Tried to put it out with my hands and hat first.
Q. Anybody besides you and Sam. Pryor there?
A. I noticed Dick Jones and John Edwards.
Q. Go ahead and tell what you did then.
A. At the time I came down I saw the fire was spreading. I jumped upon the top of the cotton, ran west in the shed to get the hose—the hose was the first thing I thought of—then turned them on and the water would not run. I ran back then right around from the fire, tried to throw a couple of bales off the platform. The fire spread so rapidly I had to jump down off the platform and run straight down to the river.

Q. How long was it from the time that you got down
267 there and attempted to use the hose before it spread all around?

A. About seven or ten minutes, I guess.
Q. Had you been in the compress shed during the day?
A. Yes, sir.
Q. How long since you had left it?
A. It could not have been more than four or five minutes, I guess.

J. A. GINNOCHIE testified for defendant:

Q. State where you were at the time the fire began in the compress shed at the foot of Main street in the fall of 1887.
A. I was in the boat-house of the Athletic Association.
Q. How long had you been there?
A. I should judge, about half an hour. I could not tell exactly.
Q. What were you doing there, Mr. Ginocchie?
A. Playing ten-pins at the time.

Q. Who were with you?
268 A. Horace Kimball and Deadrick Cantrell.

Q. What was the occasion of your first noticing—how was your attention first called to the fire?

A. One of the gentlemen hollered that they heard some one give the alarm; some one looked out of the east window and saw the fire and gave the alarm. From there we went into the directors' office; from there we noticed the fire.

Q. You say you were in the bowling alley when Mr. Kimball raised the alarm?

A. Yes, sir.

Q. Go ahead and tell what you did, etc.

A. As soon as we saw there was a fire we ran up to the directors' window. There were windows in that room facing both east and south, and of course from the south window we could see the
269 fire; looked at that time fifteen or twenty feet from us; perhaps a little farther.

Q. How large a fire was it that time?

A. I think there was about one bale of cotton on fire.

Q. Where was that bale of cotton on fire?

A. On the east side of the little platform, or rather the flight of stairs that led up into the compress, and about the second or third bale, I could not say which, from the end of the platform.

Q. Go on and tell what you and the others did.

A. We had no idea of the boat-house being in danger, so we thought perhaps a little water could put out the cotton on fire; we went into the boat-house; we took a large, tin bucket; by the time we got down there the fire had spread all over the bales of cotton; then we attempted to put the hose on, but the heat was so
270 intense that we went down below and began to carry the boats out.

Q. Did you see any boys around the Athletic Association building awhile before that fire?

A. When we went down there my recollection is we found two; they were in a different part of the building.

Q. Do you know what became of them?

A. No, sir. I know they left while we were there.

Q. Did you see any men about that fire when you looked out?

A. Yes, sir.

Q. What were they doing?

A. I think there were two of them attempting to put out the bale of cotton that was on fire.

Q. In what way?

A. I saw one have his hat trying to smother the flame.

HORACE KIMBALL testified for defendant:

271 Q. State where you were at the time the fire broke out in the cotton at the foot of Main street spoken of.

A. In the basement floor of the building known as the Athletic Association building.

Q. How long had you been there?

A. About twenty minutes or half an hour.

Q. Who were with you?

A. Gennocchie and Cantrell.
Q. What were doing there?
A. Playing cocked hat.
Q. What was the first intimation or notice of the fire?
A. Three of us were rolling. I heard a cry of murder or fire or something and ran to the north door, but saw nothing there, and then ran back and looked out of the window on the east side and saw two men running towards a bale of cotton in the old compress shed, on the lower floor.

272 Q. Where was the bale of cotton?
A. In the gangway in the street.
Q. East or west side?
A. East side.
Q. You saw that from the east window in the basement room?
A. Yes, sir.
Q. What did you do then?
A. The first thing, I told the other gentlemen to look at the fire, and then we got our hose out to save the building if we could. We attached the hose and took it up to the porch above.
Q. Did you see any men out there?
A. Yes, sir.
Q. Did you see any men when you first looked out there?
A. Two or three.
Q. What were they doing?
A. Trying to smother the fire with their hats.
Q. When you got up on the gallery to what extent had the fire spread?

273 A. Considerable—a space of twenty feet. I know of no fire in the west end of the compress—none that I saw. I could see this bale east of the boat-house. There was a fire in that bale.

Q. What direction was the fire spreading in?
A. In all directions, very fast.
Q. What part of the boat-house did it come in first?
A. The south side.
Q. Which end?
A. I should judge the south or east; right on the southeast corner of the boat-house. I don't remember looking out of any window. When I got down there the fire was all over the south side of the boat-house.
Q. State what you young men did.
A. We tried to get our furniture. We had a desk upstairs. While we were doing that it became so hot we could not get it, so we went down to get the boats out, in a room in the basement on the north side.

Q. Did you see some boys down there?
274 A. They were there, I think, when we first came.
Q. Do you know what became of them?
A. I don't know.
Q. How many were there?

A. I think two or three. They left before we began rolling. Some boys were always around there.

DEADRICK CANTRELL testified for defendant:

Q. State where you were at the time the fire broke out at the foot of Main street?

A. At the Athletic Association Building.

Q. Who was with you?

A. Gennocchie and Kimball.

Q. What were you doing there?

A. Rolling cocked hat.

Q. What part of the building were you in?

A. The bowling alley, on the first floor.

Q. What was the first notice you had of the fire?

275 A. I think it was an alarm by Mr. Kimball.

Q. Then what did you do?

A. I think at first he thought it was some one in the river, but afterwards discovered that it was a fire and called our attention to it, and we went upstairs to see the fire.

Q. Where was it at that time?

A. My remembrance of it is that it was a little southeast of that point and in Main street.

Q. State, with reference to the steps that came from Main street down to the second platform, was it east or west with reference to those steps?

A. Probably the cotton was on a line with the few steps to the right of the gangway going towards the river east of the passage-way.

Q. How much cotton was on fire?

A. One bale.

Q. Did you see any person about it?

276 A. Yes; two or three men trying to put it out.

Q. Could you see over on the west end of the compress shed? Was there a window on the south side of the directors' room, or did that porch extend down to the corner?

A. Yes, sir; you could go out on the porch and see to the west end.

Q. Was there any fire in the west end of the compress shed?

A. I didn't see any.

Q. Would you have seen it if there had been some?

A. I think I would.

Q. Please state how rapidly the fire spread.

A. Very rapidly.

Q. In what direction?

A. In every direction—all around everywhere.

Q. What did you do after you had come upstairs and saw where the fire was?

277 A. I think the first thing we tried to get some water; thought maybe we could wet the side of the boat-house and keep it from taking fire; soon abandoned that idea and tried

to get the furniture out, but had to give that up, and then went down-stairs after the boats.

C. W. HEQUEMBOURG testified for defendant:

Q. Were you connected in any way with the Iron Mountain railroad in 1886 and 1887?

A. Yes, sir.

Q. What was your relation to that company?

A. Car-service agent.

Q. What duties did your position impose upon you?

A. The distribution of cars for traffic upon all portions and divisions of the road and branches.

Q. State how the freight-car service, in regard to the number of cars, compared in the fall of 1887 with what it was in the preceding year.

A. I would like to answer your further remark by saying
278 that in 1886 I was secretary for the general superintendent. I would say that in 1887, as compared with 1886, that the Iron Mountain was furnished with from 20 to 30 per cent. more cars in 1887 than in 1886.

Q. State to the jury all the facts in regard to the matter—the number of cars put on the line in 1887, what was there in 1886, and what cars were provided for the business of 1887.

A. During 1886, possibly everybody remembers that there was a strike upon the roads of the country, and for the spring of 1886 the traffic—freight traffic, particularly—upon the Iron Mountain road was very seriously interfered with, and it was not until May of that year that traffic was fully resumed. We were very badly pressed for cars for all classes of traffic during 1886, and, anticipating the increased volume of business all over the road, the company,
279 in the fall of 1886, contracted for a large number of new cars besides those they had contracted for previously, and the contracts were let in the months of October and November, 1886, for 4,155 new cars, anticipating the increased business that would come from the country. Of that number of new cars—the car works of the country were at that time overrun with work and it was very difficult to make a contract with any particular car works to furnish the cars in the time needed, and the contract was distributed between four different car manufactories, providing that they should deliver the cars after a certain day at so many per day; the last were delivered in June, 1887. Of that number of new cars, over 3,000 of them were sent in 1887 to the Arkansas Division of the Iron Mountain road in order to care for the cotton and the lumber business of this territory. In addition to that, from the infor-
280 mation received from the people in managing the road at this end and from enquiries that we had made as car-service agent, I borrowed from different roads, our direct connections, for the movement of cotton, more particularly, between August, 1887, and December, about 10,000 foreign cars, which were moved here on the line of the Iron Mountain railroad, to handle business of that year. I would state further that as secretary of the general super-

intendent, in 1886, it was customary to anticipate what the traffic of the particular locality or State would be, and by direct enquiries from agents, too all the different towns and counties, information was derived as to the anticipated business for the coming season. In 1886 I prepared for the general superintendent and general manager a statement as to the increased business anticipated from
281 Arkansas and Missouri on the line of the Iron Mountain, particularly as regarded lumber and cotton. Of course, it was too far in advance to tell what the season would be, as far as cotton was concerned, but we asked, particularly of the mill men, their increased capacity, the number of thousands of feet of lumber on hand, and what they expected to do during the season. Upon that report was based the order to the car works for the increased number of cars.

Q. What did I understand you to state was the percentage of increase in 1887?

A. Fully twenty per cent., if not thirty per cent., on the line of the Iron Mountain.

Q. Did your duties make it necessary for you to be familiar with the volume of business, so far as it affected the car service?

A. My duty was particularly the distribution of cars and
282 a knowledge as to the business on the roads on each division.

Q. Please state to what extent the facilities furnished in 1887 would have enabled the company to move the cotton crop expeditiously if the season had been an ordinary season.

A. If the season of 1887 had not been in advance of the regular years, I believe that with the increased number of cars that we furnished the Iron Mountain, more particularly Arkansas, that there would have been no trouble in handling the business.

ROSE:

Q. How is that?

A. If the season of 1887 compared with 1886 with the increased number of cars that were delivered and furnished to the Arkansas lines of the Iron Mountain railway, I don't believe that we would have had much trouble in handling the cotton business.

Q. Something has been said in this case in regard to the
283 shortage of the means of transportation furnished to the lumber men during the months of October and November during several years. State to the jury if there is any special reason causing the shortage in those months as distinguished from the other months of the year.

A. As a general thing, the heavy shipments of lumber occurred about the fall during the heavy cotton shipments, and it has been the policy and the practice of the roads since I have been with them to favor the cotton shipments, and all box-cars for which the lumber dealers would ask during that season were turned into the cotton trade, and the lumber interests were cut short by the fact of turning the closed cars into the cotton trade instead of giving them to the lumber interests.

Cross-examination:

Q. Is that your signature?

A. Yes, sir.

284 Q. I understood you to say that in 1886 there was a strike upon the road and it interfered with the traffic. What time did it occur?

A. In March, 1886?

Q. How long did it last?

A. The strike actually lasted, without the movement of a train, until about April 4th.

Q. What time in March did it begin?

A. On the 4th or 5th. I think it was March 6th it became general.

Q. Traffic was resumed what day in April?

A. About the 6th—about 29 or 30 days the strike lasted.

Q. Was traffic interrupted after that date during 1886?

A. Not on account of the strike.

Q. Business being resumed in 1886, on the 6th day of April, was that a reason for the difficulty in getting cotton out in the fall?

285 A. During the strike in 1886 the engines were demolished; it took considerable time to get the equipment in order again. My recollection is that the percentage of cars unfit for service during 1886 exceeded any previous year in the history of the road.

Q. It was impossible to get the cars to transport the cotton by reason of the strike in the spring?

A. No, sir.

Q. State what you mean; you stated the strike in the spring interfered with the transportation of freight in that year. Why was it the cotton was not moved in 1886?

A. I think it was.

Q. There was a great and unexpected increase of business in 1887 over 1886, you say. What was it caused by?

A. The development of the country generally, both in lumbering and farming?

286 Q. Where were you during that time, in 1886?

A. In the city of St. Louis—located there.

Q. Did not the company have officers here in the State which would see the increase going on?

A. Exactly, sir; and from them we got the information that there would be an increase.

Q. During all that time, whenever there was a scarcity didn't you favor Texas?

A. We had nothing to do with Texas.

Q. Did not the Iron Mountain road have connections with Texas roads?

A. It had connections but no business furnishing cars to them.

Q. Didn't you furnish cars from St. Louis to the Texas line?

A. No, sir; excepting the through business.

Q. I am talking about loaded cars.

A. Yes, sir.

Q. The through business for Texas was taken by way of Texarkana, was it not?

A. Not necessarily so.

287 Q. Didn't you, by way of favoring a long haul, furnish cars to carry the through freight?

A. It has been, since I have been car-service agent, the practice to use foreign cars for the long hauls.

Q. Where did the foreign cars come from?

A. From connecting lines.

Q. Borrowed by you?

A. Yes, sir; not the loaded car-.

Q. Had the railroad been borrowing cars to make up any deficiency you might have?

A. For any unexpected traffic to go over the line of the connecting road. We anticipated a very heavy increase in traffic in the fall of 1887, and it was really beyond expectations or anticipations.

Q. Don't you know there had been a deficiency in cars to transport the crops promptly and the lumber in 1884, 1885, and 1886?

A. I don't think that 1884 or 1885 had any comparison

288 with 1886 and 1887.

Q. Still there was a lack of cars?

A. There is no railroad in the world can afford to keep an equipment for a maximum traffic, and in the fall of the year there would possibly be an exceedingly heavy traffic, and we would have to make other arrangements for anticipating where the cotton is going to and where the lumber is going to and to procure cars from their connecting lines.

Q. You mean when there is an extraordinary demand upon railroads that they are under no obligations to be in a condition to transport?

A. My view is that they should prepare themselves to handle it promptly, efficiently, and without delay.

Q. Didn't you state no railroad company could do that?

A. I stated that no railroad company could afford to main-

289 tain an equipment equal to the maximum trade, for any unexpected trade.

Q. I understand what you say, but you say you borrowed 10,000 cars in 1887?

A. I said between certain months.

Q. What months?

A. Between September and December.

Q. Where did you borrow them?

A. From our immediate connections.

Q. Isn't it true that while there may be a great pressure here there would not be so much in other parts of the country, and they can hire cars for certain emergencies?

A. I don't know what you mean by hire them.

Q. Borrow them.

A. Yes, sir.

Q. Would you pay anything for them?

A. Pay mileage for the cars, and give that road the benefit of the loaded haul.

Q. That is what people generally call hiring them. You paid something for them, didn't you?

290 A. There is a universal custom in the country that there is a mileage paid for every mile that a car makes over another road.

Q. Could not the cars have been hired in the United States for the purpose of transporting the crops in the fall of 1886 and 1887?

A. Not other than in the usual way; they could not have been hired at a rental per day.

Q. I am not talking about renting.

A. We could not have hired them.

Q. Could you have borrowed them?

A. Not unless we would guarantee to return them with a load, which gave them the traffic.

Q. You could have done it that way, could you?

A. We did do it.

Q. Did you get a sufficient number of cars to transport the freight promptly piled up at the stations?

A. From my own personal knowledge, I believe we did.

Q. You think you did?

291 A. Yes, sir.

Q. Why was not the freight transported promptly, then, if you had cars enough?

A. In 1886?

Q. Yes.

A. Well, I explained to you a little while ago the trouble in 1886.

Q. That was in the spring. I mean in the fall.

A. It took considerable time to recover, and in the fall of 1886 we made the contract for the anticipated increase of business in 1887.

Q. You say you had the cars in 1886. Why wasn't the freight removed faster? You say you had cars enough.

A. No; I didn't say that.

Q. I understood you to say you had.

A. I didn't say that for 1886, because in the fall of 1886 we knew that we didn't have enough cars to handle the business, and contracted for 4,155 more cars for 1887.

292 Q. Why didn't you borrow the cars for the purpose of moving the cotton in 1886?

A. If the cotton would go over eastern lines, or had a through rate or routing, we could possibly have gotten the cars.

Q. What do you mean by a through routing?

A. I mean 5,000 or 6,000 bales of cotton, for instance, down here at Pine Bluff, waiting loading for a routing to be got, and for the proper line to name a rate over which it could go north or south.

Q. What would hinder you from borrowing cars for a short line as well as a long one?

A. There are no short lines to furnish cars to New York, not more than we could afford to let our own go.

Q. Are there not companies engaged in hiring cars to railroad companies?

A. None that I know of, except trust companies.

293 Q. Well, the trust companies?

A. They sell the cars.

Q. Don't they hire them also?

A. It is impossible for me to say.

Q. Cars could have been bought of them, could they not?

A. Not in a sufficient number to take care of the next month's business. They might have been bought one year to handle the business of the next year.

Q. Was it on account of the deficiency in your cars in 1886 that you concluded it would be necessary to get more for 1887?

A. Yes, sir.

Q. Didn't you try to get just about a sufficient quantity to carry off the same quantity of freight that was carried off in 1886?

A. As I stated, we had made and did during the year—in the fall of the year—ask the mill men, through our agents, the expectations of their track for the year—how much lumber they had

294 on hand, etc. We could not do that, of course, in the fall of 1886 for the cotton crop of 1887, but it was generally the practice to anticipate these things and find out what the crop of the country would be.

Q. Were there not a great many complaints in 1886 about the want of cars?

A. Yes; a great many.

Q. How many cars did you order to be constructed?

A. 4,155.

Q. What was the increase in mileage of the road in that year, 1886–1887?

A. None, sir; there might have been a few miles; some branches added small lines, but no material increase.

Q. How many of those cars that you speak of came to Little Rock for receiving freight here?

A. I could not state positively. I could upon investigation.

Q. It was not enough, was it, at Little Rock?

A. You mean in 1886?

Q. I mean in 1887.

295 A. I believe that there were more cars in Little Rock in 1887 than would have moved all the cotton that was here—plenty of cars to move every bale of cotton that was here.

Q. You don't know why it was not done?

A. No, sir.

Q. Were there enough cars in 1886 to move all cotton and lumber at this place?

A. To move it in the ordinary course of business, there were not in 1886.

Q. Wasn't there continual complaint in 1885 and 1886 that cotton and lumber were allowed to accumulate along the road to the great injury of the shippers?

A. There may have been some complaint in 1885, but not a very forcible one; but 1886 was very bad.

Q. 1887 was still worse, was it not?

A. The business of the lumbermen increased, to my own knowledge, 25 per cent. over 1886.

296 Q. How many bales of cotton can you carry in a freight car, uncompressed?

A. From 18 to 20 or 22. I never have loaded cotton in cars, but about that, I guess. It depends on the size of the car altogether.

Q. There were, then, plenty of cars in 1887 to move the cotton crop here?

A. I think that there were cars enough to have moved the cotton, provided it had been moved when it was offered.

Q. The Iron Mountain road is a part of the Missouri Pacific system?

A. It is operated—yes, sir—under the Missouri Pacific system.

Q. Are you the agent for the car service of the Iron Mountain or for the whole system?

A. For the whole system.

Q. Were these cars ordered for the Iron Mountain or for the whole system?

A. They were ordered for the system.

297 Q. That includes roads in Missouri, Arkansas, Texas, and Kansas?

A. Yes, sir.

Q. How many miles of road belong to that system?

A. About 5,012—5,100 now.

Q. How many miles in Arkansas.

A. About 1,200.

Q. Was that about the condition of things in 1887 or not?

A. Yes, sir—no, sir; the mileage in 1887 was a little larger than it is now.

Q. How large in 1887 for the whole system?

A. A little over 6,000 miles, I think.

Q. What was the mileage in Arkansas at that time?

A. The same as it is now, with the exception of a few lines—little branches.

Q. These 4,155 cars were made for the entire Missouri Pacific system?

A. Yes, sir.

Q. How were they distributed?

298 A. As I said, there were about 3,327 of these cars that were moved to the Iron Mountain railroad for hauling this business in 1887.

Q. Including the cars that you had made or part of those that were borrowed?

A. These are all new cars which I speak of now.

Q. They were sent here, but weren't they sent around and distributed everywhere?

A. A car that goes upon a railroad to be loaded, if it is loaded,

for another point off of the line of that road, of the same gauge, it goes through unless objection is made by the receiving line.

Q. Cotton shipped in this State nearly all went out of the State, didn't it?

A. I think a very large part went to St. Louis.

Q. What was done with those cars when unloaded in St. Louis?

A. They were returned here to Arkansas.

299 Q. Were they not sent to other parts of the State?

A. In the fall of 1887 there was no necessity for that. I arbitrarily took them from the other parts of the State—something like 3,500 or 4,000—and had them moved to the Iron Mountain system.

Q. And the 10,000 borrowed cars?

A. Those 10,000 foreign cars were borrowed between the months of September and December. I mean——

Q. You borrowed them from foreign lines?

A. Entirely foreign lines.

Q. What foreign lines were they?

A. All our northeastern and northern connections and southeastern connections.

Q. You didn't borrow any from any lines except lines connected with you in business?

A. No, sir; we borrowed some from through-freight lines operated by different railroads.

300 Q. Isn't the custom with all roads when they have cars intended to rent out, as you call it, they will do so to anybody who is willing to pay the mileage?

A. I presume if a road had a large equipment they would be perfectly willing to let their car go through with the loading it contained, but I don't think the roads generally loan empty cars for the mileage; they are not built for that purpose.

Q. Then, you frequently let other roads have cars for mileage?

A. No, sir; not with our consent; at no time. We might upon the construction of new lines furnish equipment where it was directly beneficial to the line. They might put themselves out to loan cars upon a stated price per day, but not upon mileage; the traffic alone controls mileage and governs.

Judge CALDWELL:

301 Q. When you speak of cars for moving do you have reference to moving it to the market only or do you also include the moving from Little Rock to Argenta to be compressed?

A. I have reference particularly in moving the crop of the season. As far as my knowledge is concerned, there was no intimation ever given to my office regarding the cars necessary or required to move cotton from Little Rock to Argenta. We had sufficient cars to move through the country the cotton offered.

Q. What is the distance from the point in Little Rock where the cotton is received to the compress in Argenta?

A. I could only state that generally by saying that I don't know

what it is; never have been around there; not over three or four miles.

Q. Supposing it to be a mile or two, how many cars would it take to transport the cotton from Little Rock to Argenta, as
302 it would properly be delivered?

A. I don't think it would take over ten or twelve cars a day, if the cotton was ready to move, unless—if you will allow me to explain—unless the warehouse was to receive the cotton and hold it at somebody's order or risk, or order of consignment.

Judge CALDWELL:

Q. Suppose it was ready for delivery to the railway company for transportation?

A. I don't think the business of Little Rock would require more than fifteen or twenty, and they could be moved over there, be unloaded promptly, and come back again. No demand was made, particularly at that time, to move cotton from Little Rock to Argenta. I see no reason why the cars could not have been furnished without trouble to move the cotton, as I understand the case now, from Main street to Argenta without trouble, provided the
303 compress was ready to move the cotton and unload it.

Redirect examination:

Q. I was going to ask you if your answer to that question referred to the transportation of cotton alone to be transported between Little Rock and Argenta?

A. No, sir; that would be considered simply as switching.

Q. Have you had any experience—know anything about the business of compressing cotton?

A. Only in a general way. I have seen a compress at work and know how they do compress; know about, from general knowledge, how many bales of cotton could be loaded in a car.

Q. Do you know anything about the location and business of the Union Compress Company at Argenta?

A. No, sir. I never was there.

Q. Assuming that cotton was loaded on cars to be shipped
304 to its destination by the various railroads that carry cotton from here, I want to ask you the question whether or not the movement of cotton from that point would be affected by the unexpected influx of cotton during that season?

A. Yes, sir; the same as the movement of cotton throughout the State would be; and I want to explain, so far as my personal knowledge goes, we have no knowledge of Main street as being a depot for the receiving of cotton other than the usual offices of the road.

Q. I understand that the removal of cotton from the compress would be affected by this unexpected influx of cotton, assuming that cotton was shipped to its destination?

A. Yes, sir. If they had 1,000 bales to go over the Wabash they would try to get Wabash cars for it, and so on.

Q. How many cars were borrowed from foreign connec-
305 tions for service that fall?

A. Between 10,000 and 12,000 cars; could not give it exactly.

Q. How many cars were taken from other portions of the Missouri Pacific system and put into service in this State during that fall?

A. As an estimate, from 3,000 to 4,000 per month.

Q. How many of the 4,155 cars built under the order made in 1886—how many cars were assigned to this road in this State?

A. About 3,300 cars; 3,327, I think, sent to the Iron Mountain.

Q. State whether or not these new cars and those taken from other portions of the road and cars borrowed—whether or not they were in addition to the regular car service that belonged to this line?

A. Yes, sir; that was in addition to what belonged to the Iron Mountain road.

306 Q. You were asked if you could not have hired cars from other lines. What do you state about your ability to procure cars on short notice?

A. The question, as I understood it, was whether there were any companies willing to hire cars to railroads.

Q. State what your facilities for getting cars in a short time would have been in that way in 1886 and 1887?

A. You could not get them; it would be an impossibility; have to buy them and have the car works make them. It would take time to get the lumber from Arkansas to the car works, iron, etc., and other material.

Q. What efforts, if any, were made to obtain *to* cars to meet the emergency to carry on the cotton traffic in this State in 1887?

A. As I stated before, at my own instance I caused enquiries to be made——

307 Q. What I want to know is whether you exhausted all the efforts to meet this emergency in 1887?

A. Yes, sir; we did all possible to get cars to handle the traffic, and used means that were possibly not legitimate between railroads in order to help that much—in fact, stole cars.

Q. How do you mean, stole cars?

A. Cars coming loaded, instead of returning them we sent them to Arkansas to take care of the cotton.

Q. Referring to the subject of the estimate you made in the fall of 1886 of the business of 1887, state what that estimate was based upon.

A. The information received from the agents at the different stations and the prominent people in the different counties and from the lumbermen themselves as to the increased capacity of their mills, etc.

Q. What was the object in making that estimate?

308 A. In order to handle the business for the coming season.

Q. State what you did after the estimate was made.

A. I presented it to the general superintendent and general man-

ager, and in November they contracted with the different car works for the new cars, 4,155.

Q. Was there anything unusual in the movement of cotton in this State and in the country generally in the fall of 1887?

A. The crop of 1887 was largely in excess of the crop of 1886 and much earlier.

Q. State in what manner it affected the efficiency of the means that you had adopted for moving the business of that fall. State if it was affected in any way and to what extent. You say you had increased facilities for moving the business of this season upon the basis of the estimate made in the fall of 1886; state what effect, if any, the unusual market of the cotton crop of 1887 had.

309 A. We had always based, since my connection with the Iron Mountain road, our cotton season as commencing on the first of September. In the season of 1887 the cotton commenced moving very early in the preceding month, and we were very short of cars to handle that during August, but in September we got about the usual number of cars to handle the crop, and kept it going.

Q. If it had come in in the usual time, state what effect upon the arrangements you had made this would have had upon your ability to move the crop.

A. I think to move it as it came in, according to the business before, we would have found we had a little underestimated the season compared with the crop of 1886. We have had no trouble since; very little trouble in 1888.

310 Q. Have you personal knowledge with regard to the movement of cotton in the fall of 1887 between the foot of Main street and the compress in Argenta?

A. I never heard of it until I was subpœnaed as a witness; know nothing about it whatever.

Q. Do you nothing about what effect the early marketing of the cotton crop had upon the means necessary to move the cotton from Main street to Argenta?

A. Only from the general idea—seeing cotton come in.

Q. What I mean is this: Have you any personal knowledge of the effect that the early season had in the movement and facilities for moving cotton from the foot of Main street to the compress in Argenta?

A. No, sir; of my own personal knowledge I have none; never knew of any such place before.

Recross-examination:

311 Q. Speaking of borrowing cars and paying mileage, what is the customary rate per mile?

A. ¾ of a cent per mile.

Q. That is with the expectation that the car is to come back loaded?

A. When we take the empty car we expect to give it back loaded and when we take it from them loaded we give it back empty.

Q. Suppose you take it empty and return it empty, how much do you pay?

A. The same thing.

Mr. L. B. LEIGH, for defendant, testified:

Q. Which of these companies were your firm, Gress and Leigh, agents for the policies in suit here?

A. I represented the plaintiffs, The Sun Mutual Insurance Company and The Commercial Union Assurance Company of London.

312 Q. At the time these policies were issued were the members of your firm acquainted with the condition of the compress sheds as to the storage of cotton?

A. Yes, sir; they were.

Q. Was there a board representing the local insurance companies who established rates for the insurance of cotton in the fall of 1887?

A. Yes.

Q. Were you a member of that board?

A. Yes.

Q. Tell me what rates for cotton at the foot of Main street were established.

A. The rate was established when cotton began to be stored there, three and one-half per cent. per annum, and after the compress machinery was put up, which included boiler and engine, we increased the rate one per cent.—that is, to four and one-half per cent., to cover additional hazard. When the machinery was taken out we reduced to three and one-half again, and that was the rate at the time of the fire.

313 Q. How did that compare with the rate of insurance on cotton at other points in the city at that time?

A. The customary rate on cotton in the streets of the city at that time was three per cent.

Q. What was it at other places of storage besides the streets?

A. One and three-quarters to two or two and one-quarter.

Q. In the warehouse it was one and three-quarters to two and one-quarter; in the street, three, and at the foot of Main street, three and a half?

A. Yes, sir.

Q. Why were these increased rates at the foot of Main street, on account of the increased hazard?

A. Yes; it was considered worth a few per cent. more than the average street risk.

Cross-examination:

314 Q. What did you say the premium was after the compress machinery was removed?

A. Three and one-half per cent.

Q. Was there any other place in town where you charged the same amount?

A. No, sir; I think three per cent. was the maximum elsewhere.

Q. What were the peculiar elements of danger there which made the premium higher?

A. Passing locomotives and the magnitude of the risk.

Q. What do you mean by that?

A. Cotton extended from the city prison, west side of the frame compress, in the street, down to Martin's warehouse, on the other street, all one risk, and the area of cotton risk has something to do with the hazard of it.

Q. And the quantity of cotton together in one place?

A. Yes, sir.

Q. There was increased danger from all causes?

315 A. Yes; from all causes.

Q. Did you consider the proximity to the railroad as cutting any figure in the premium?

A. Yes.

Q. Do you remember whether you insured that year for J. B. Miller?

A. Yes, sir.

Q. How much did he pay?

A. Three per cent.

Redirect examination:

Q. Did the fact that the cotton was piled up in Main street cut any figure in the risk?

A. That didn't improve it any, but the fact that cotton was stored in the public street—everybody has access to the public street—did cut a figure in it.

J. F. BOYLE testified for defendant:

Q. You say you were a member of that board representing

316 the local insurance agencies in regard to premiums?

A. Yes, sir.

Q. Did you hear the testimony of Mr. Leigh?

A. Yes.

Q. Do you make the same statements?

A. Yes, sir.

Q. Can you make a list, and furnish to the court, of the companies that were involved in this case for whom you were agents?

A. Yes, sir. We only represented and were agents for plaintiff—Insurance Company of North America. Gress & Leigh were agents for the others.

Q. Were you acquainted with the manner in which cotton was handled and stored at the foot of Main street during the fall of 1887?

A. Yes, sir.

It was here admitted that Griffith & Brisbin, another firm of insurance agents at the time in Little Rock, also knew the

317 condition of the cotton at the foot of Main street and its overcrowded condition, and that these companies issued policies

of insurance upon cotton in the street and warehouses at that point at the same rate of three and one-half per cent. per annum.

S. N. MARSHALL testified for defendant:

Q. At the time of the compress fire were you agent for any of the insurance companies plaintiffs in this suit?

A. No.

Q. Who was?

A. Adams & Boyle were agents for Insurance Company of North America, and Gress & Leigh were agents for the Commercial Union Insurance Company and Sun Mutual of New Orleans.

Q. See if these were the policies then written and in existence on the Sam. O. Smith & Co.'s cotton?

318 A. Yes, sir; these are the policies.

Q. Can you tell who made the payment of the losses?

A. No, sir.

Q. The policies had been assigned at the time, hadn't they, as security?

A. Yes, sir; they so show on the policy.

Q. Where was your office located at the time you issued the policies?

A. No. 204 West Markham.

Q. How far from the foot of Main street?

A. About one and a half blocks.

Q. Did you go down to look at the condition of the cotton at that point any time during the fall of 1887, prior to the fire?

A. Yes.

Q. Did you know what its condition then was?

A. I did. It varied somewhat.

Q. You knew there was a large accumulation of cotton there, didn't you?

319 A. I knew there was a large amount of cotton coming in there.

Q. Didn't you know cotton was accumulating there—a large amount?

A. The only thing in which I was deceived was the amount of cotton on the street. I was not prepared for that.

Q. In what way were you deceived?

A. I did not know that it extended across the street until I went down to the fire; didn't realize it.

Q. You saw cotton in the street when you went down there?

A. Yes.

Q. How often did you go down there?

A. I can't say; perhaps once—two or three times a month; maybe oftener than that.

Q. What was your object in going down there?

A. I wanted to see what was going on.

Q. Did you go to see the condition of the cotton?

320 A. Yes, sir; and for the purpose of finding out the amount of cotton people had in the compress. Sometimes I found it very full and sometimes it would be thinned out.

Q. Did you charge the same or a higher rate of premium at that point than you did at other places?

A. I will say that the rate was higher, rather; but I would also like to state that the rate had been reduced on account of the removal of the steam compress, which occurred just before. The rate had been reduced on account of the removal of the compress machinery.

Q. The compress was removed in June. I asked whether the premiums on the cotton covered by these policies was higher compared with the premiums on cotton at other points in the city?

321 A. Rather higher than the average, I believe.

Q. Why did you charge a higher rate of interest at that place than at other places?

A. The rule is, it is more exposed in an open place and on the streets.

Q. Didn't you charge a higher rate at the foot of Main street than in any other point in Little Rock?

A. Not at the time of the fire. We did during the existence of the compress—the highest at any point in Little Rock; but after that was removed a very material reduction was made; I don't remember exactly what.

Cross-examination:

Q. Why did you charge a higher rate of premium there than at other places?

A. Well, it was more exposed, and sometimes the cotton was in the streets and the compress itself was open.

322 Q. I mean after the compress was moved.

A. I cannot say what value the railroad had on it. I am not prepared to say what additional charges, if any, on account of the railroad; but if you remember, the shed was entirely open, and sometimes the cotton would stretch entirely across Main street; they often found it the case.

Q. Did you know at the time the cotton was insured that there was an arrangement by which the cotton was to be taken to Argenta for compression?

A. I knew that such was being done.

Q. Did you know who was doing that—taking it across the river?

A. I don't know anything about the arrangement.

Q. Did you expect this cotton to be transported in due time across the river when it was insured?

323 A. I may say there was a good deal of complaint on the part of the companies about taking the cotton where it was accumulating. They seemed to dread the accumulation of such an amount of cotton there, and I know we had more or less difficulty in carrying the risk.

Q. What was the rate of premium before the compress was removed?

A. I think four and a half per cent.

Q. What was it after the compress was removed?

A. I recollect, three and one half per cent.
Q. Was that rate in force at the time the compress was removed?
A. The action was taken by the board very soon afterwards.
Q. And remained in force?
A. Yes; up to the time of the fire.
Q. Was that rate about the same as in other places in Little Rock?
A. I think the rate there was a little higher than in most other places.
324 Q. Were there any other places where the rate was the same?
A. I think so. I think open, unprotected yards would be as high as that.
Q. You say the companies complained about the accumulation of cotton at that point. Did they increase the risk, after the compress company removed the machinery from that place, on that account?
A. They did—yes, sir.
Q. Increase it?
A. Very much—yes, sir.
Q. You mean reduced it?
A. When the compress company removed the machinery.
Q. That was uniform from that time until the fire?
A. Certainly; it was not changed.
Q. You didn't make any increase at all on account of the accumulation of cotton there?
A. No, sir; nothing of that sort.

Redirect examination:

Q. You say your companies complained about your taking risks at that place, didn't you?
325 A. I did—yes, sir.
Q. And what was the cause of the complaint?
A. As far as local agents are concerned, they are unaccountable. Sometimes they get it into their heads that certain things are bad. Some of the companies would not write then.
Q. When you speak of complaints you mean complaints were made to their representatives about taking policies at that point?
A. Yes.
Q. Did some of the companies refuse to take policies at that point?
A. Yes; some did.
Q. Tell me, was there not a board of some sort, representing the local insurance agencies of this city, which made rates?
A. As far as that is concerned, the board usually had the name of doing so. The basis rate was ordinarily given by the com-
326 panies themselves or the State board, and upon them we figured the relative cost of the insurance.
Q. Who composed the local board that fixed the rates for insurance at the foot of Main street in the fall of 1887?

A. I think Adams & Boyle, Gress & Leigh, Griffith & Brisbin, and myself.

Q. You established rates at that and other points in town which were charged by all the companies doing business here?

A. Yes.

Q. The rate at the foot of Main street was three and one-half per cent.?

A. Yes, sir.

Q. Was there any other point in town at which that rate——

A. It seems to me there was.

Q. What point was it?

A. I think all open yards; I mean unfenced.

Q. Did the board keep a record of its proceedings?

A. It is supposed to have done so.

327 Q. Who was secretary?

A. Mr. Leigh.

Q. He has the custody of that record?

A. He ought to have; he may not have, but his successor has.

Q. The record will show the rate charged at that point?

A. Yes, sir.

Q. Who was his successor?

A. Mr. Yeakle, I think.

J. H. SHINN testified for defendant:

Q. What companies (foreign corporations) filed certificates in the secretary of state's office, as required by statute, in 1887?

A. The Mass. Benefit Co. filed certificate during 1887 and 1888. No fire or marine insurance companies filed any certificates; I think no insurance companies except the mutual life companies. If you have the names I can tell you exactly—the list that you
328 showed me some months ago and asked me to look at. I have all the records from 1887 to the present. I don't know of a single fire insurance company that filed a certificate prior to the first of January, 1888.

Q. What is your occupation?

A. Clerk in the office *in* the secretary of state.

Q. What have you there in your custody?

A. Index to certificates of appointment of agencies under the act in 1887—foreign corporations.

Q. Have you a book in which you keep a record of such companies as complied with the act of 1887?

A. This is the record.

Q. The record in which certificates filed by the insurance companies under the act of April 4th, 1887, were recorded?

A. Yes, sir; there is a record for all foreign corporations.

Q. State whether on the 14th of November, 1887, any foreign fire insurance company or marine insurance company, and especially the plaintiffs' insurance companies in this suit, ever
329 filed a certificate in the office of the secretary of state designating an agent upon whom process might be served and showing

the principal place of business of such company in this State, in accordance with the act of April 4th, 1887.

A. No, sir; they have not. The only two insurance companies that filed articles prior to the first of January, 1890, are the Massachusetts Mutual Benefit and Western Fire and Marine.

It was also admitted that all the companies involved in these suits were doing business in the State of Arkansas at the time of the issuance of the policies and at the time of the fire, and were in charge of local agents in this State, who issued the policies upon which plaintiffs' rights and claim are based.

It was also admitted that all the insurance companies
330 plaintiffs had complied with the statutes in Mansfield's Digest with reference to the auditor's office.

Defendant then read in evidence, without objection, the articles of agreement and incorporation of the Union Compress Company of Little Rock, which reads as follows:

"Articles of agreement and incorporation of the Union Compress Company.

Know all men by these presents that the corporation hereinafter named have this day and by these presents formed a corporation, under and in pursuance of the laws of the State of Arkansas in that behalf provided, for 'Incorporations for manufacturing and other lawful business,' and in evidence thereof do hereby execute the following articles of incorporation:

First. The name of said corporation shall be Union Com-
331 press Company.

Second. The corporators are W. H. Wright, Logan H. Root, H. P. Johnson, M. G. Hall, John G. Fletcher, R. E. Douglass, A. P. Howell, Sam. O. Smith, Geo. W. Martin, Jno. W. Deshon, and J. M. Miller.

Third. The place of business is to be located at Little Rock, Arkansas, and its office for transaction of business shall be in said city or at such other place as the board of directors may select.

Fourth. The general nature of the business proposed to be transacted by this corporation is the compressing of cotton and operating a warehouse for the storage and sale of cotton and other general warehouse purposes.

Fifth. The amount of capital stock of the said corporation shall be one hundred thousand dollars, of which eighty thousand dollars has been subscribed by the corporators aforesaid, and the residue thereof may be issued and disposed of as the board of di-
332 rectors may from time to time order and direct.

Sixth. The said capital stock shall be divided into four thousand shares of the value of $25 each.

Seventh. The affairs and business of the corporation shall be conducted and controlled by a board of directors, consisting of six members, all of whom shall be stockholders of the corporation. Said board of directors shall elect one of its members as president

and one of its members as vice-president, and shall also elect a secretary and treasurer.

Eighth. The first election for directors shall be held immediately after the organization of the corporation, and said directors shall serve for one year and until their successors are elected.

Ninth. The board of directors are empowered to ordain and establish all by-laws and regulations necessary to the
333 management and business of said corporation and alter and repeal the same at pleasure.

Tenth. The first meeting of the said corporators for organization shall be held in the city of Little Rock, at the office of Little Rock Oil and Compress Company, at ten o'clock a. m., on the 6th day of June, 1887. The subscribers hereto hereby waive notice of said meeting.

In testimony whereof we have hereunto set our hands on this the 4th day of June, 1887.

SAM. O. SMITH.
A. P. HOWELL.
M. G. HALL.
GEO. W. MARTIN.
W. H. WRIGHT.
H. P. JOHNSON.
LOGAN H. ROOTS.
R. E. DOUGLASS.
J. W. DESHON.
J. B. MILLER.
JOHN G. FLETCHER.

Certificate.

Whereas W. H. Wright, Logan H. Roots, H. P. Johnson, M. G. Hall, John G. Fletcher, R. E. Douglass, A. P. Howell, Sam.
334 O. Smith, Geo. W. Martin, Jno. W. Deshon, J. B. Miller have associated themselves together as a body politic and corporate, to be known as Union Compress Company; and

Whereas the said corporators, being the subscribers to the capital stock of the said corporation, have waived the fifteen days' notice as required by law and called a meeting for organization, to be held in the city of Little Rock, at the office of Little Rock Oil and Compress Co., at 10 o'clock a. m., on the 6th day of June, 1887;

Whereas, at the time and place above set forth, a meeting of the subscribers aforesaid was held to organize said corporation and elect six directors; and

Whereas at said meeting the following gentlemen were elected directors, to wit, S. O. Smith, A. P. Howell, M. G. Hall, Logan H. Roots, W. H. Wright, and H. P. Johnson; and
335 Whereas at a meeting of the said board of directors W. H. Wright was elected president and M. G. Hall was elected vice-president and Sam. O. Smith was elected secretary and Logan H. Roots was elected treasurer:

Now, therefore, the said W. H. Wright, as president, and the said

M. G. Hall, Logan H. Roots, Sam. O. Smith, H. P. Johnson, and A. P. Howell, as directors, do, in pursuance of law, issue this their certificate, verified by their oaths, and do hereby certify as follows:

First. Said corporation is formed for the purpose of compressing cotton and operating a warehouse for the storage and sale of cotton and other general warehouse purposes.

Second. Its capital stock is one hundred thousand dollars, divided into shares of $25 each.

Third. Eighty thousand dollars of said capital stock have
336 been actually paid in by the subscribers hereto.

Fourth. The names of the stockholders and the number of shares owned by them respectively is as follows:

Names.	No. of shares.
W. H. Wright	600
Logan H. Roots	600
H. P. Johnson	400
John G. Fletcher	200
R. E. Douglass	200
A. P. Howell	200
Sam. O. Smith	200
Geo. W. Martin	200
Jno. W. Deshon	200
J. B. Miller	200
M. G. Hall	200

In testimony whereof the said W. H. Wright, president of the said corporation, and M. G. Hall, Logan H. Roots, Sam. O. Smith, H. P. Johnson, and A. P. Howell, a majority of the board of directors of said corporation, have hereunto set their hands on this 6th day of June, 1887.

337

W. H. WRIGHT, *President.*
M. G. HALL,
SAM. O. SMITH,
LOGAN H. ROOTS,
A. P. HOWELL,
H. P. JOHNSON, *Directors.*

STATE OF ARKANSAS, }
County of Pulaski, } *ss:*

W. H. Wright, M. G. Hall, Sam. O. Smith, Logan H. Roots, A. P. Howell, H. P. Johnson on their oath say that the matters and things in the foregoing certificate set out are true, to the best of their knowledge and belief.

(Signed)

W. H. WRIGHT.
M. G. HALL.
SAM. O. SMITH.
LOGAN H. ROOTS.
A. P. HOWELL.
H. P. JOHNSON.

Subscribed and sworn to before me this the 6th day of June, 1887. In testimony whereof I have hereunto set my hand and seal of office.

338 [SEAL.] J. G. BOTSFORD,
Notary Public.

Endorsed: Filed in the office of the secretary of state June 6, 1887. E. B. Moore, sec'y state. Recorded in book 7, pages 40, 41, and 42, in articles of association, in office of secretary of state, July 18, 1887. E. B. Moore, sec'y state, by J. H. Shinn, clerk."

The defendant then offered in evidence the following petition and lease, and at the same time offered to prove the assignment of the lease to the Union Compress Company, which reads as follows, to wit:

To the honorable mayor and board of councilmen of the city of Little Rock, Ark's:

339 Your petitioners, the Little Rock Oil and Compress Company, of the city of Little Rock, respectfully ask permission to extend an open shed with a gravel roof across the foot of Main street, from their shed on the west side of that street to the brick cotton warehouse upon the opposite and east side of the said street, which shed is to be used by your petitioners for trucking and storing cotton, the east sidewalk to be, at petitioners' expense, paved with brick and kept open for pedestrians to and from skiff landing and boat-house on the river; the gutters of said sidewalk to be built at petitioners' expense and by them kept open and in proper condition.

Your petitioners pray that your honorable body grant the privileges herein asked for a period of ten years, upon the condi-
340 tion, however, that if the needs of the city or public policy require the removal of the said shed prior to the expiration of the ten years your petitioners will, after due and formal notice, without delay, remove said shed free of cost to the city. Your petitioners further recite that your honorable mayor and a majority of the councilmen have had their attention called to the condition of Main street at the point designated for the shed, and it is respectfully represented that an awning or shed at that point will be an improvement beneficial to the interests of the city, because the street in its present shape is dangerous to the public.

I, H. C. Jones, city clerk, do hereby certify that the above petition and instrument of writing is a true and correct copy and is now of record in my office, and that the said petition was granted on
341 the 26th day of June, 1883, and mayor and clerk authorized to sign contract when drawn and prepared by the city attorney.

In testimony whereof I have hereunto set my hand — seal of my office this the 6th day of July, 1883.

[SEAL.] (Signed) H. C. JONES, *City Clerk.*

Contract and Lease.

This is to certify that the city of Little Rock, through the order of her city council, made at a meeting thereof on the 26th day of June, 1883, has given and granted to the Little Rock Oil and Compress Company, of said city, license and permission to extend an open shed with a gravel roof across the foot of Main street, from their shed on the west side of said street to the brick cotton warehouse upon the opposite and east side of said street, such open
342 shed to be used by said company for the purpose of trucking and storing cotton for the period of ten years from said date, upon the following conditions, to wit:

1st. That if the needs of said city or public policy require the removal of said shed prior to the expiration of said ten years said company will, after fifteen days' notice of an order of the city council requiring such removal, without delay remove said shed free of any cost to said city.

2d. That said company will at once and at their expense pave with brick and keep open for pedestrians to and from the skiff landing and boat-house the east sidewalk of said street alongside said warehouse, and build and keep open and in proper condition the gutters of said sidewalk.

343 3d. That said company will not interfere with the free passage of any part of said street to persons desirous of lawfully using the same for the ordinary purposes of travel for which the same may now be used, and that said company will hold said city harmless against all damage, expense, or cost of any kind that may result from such license and permission or be in any manner caused or occasioned by reason of the erection or extension of such shed or anything connected therewith, and that said company will fully indemnify said city against any damage she may suffer or be made to pay and any loss that she may sustain by reason of such license and permission or the use or occupancy of any portion of said street under such license or anything connected therewith or oc-
344 casioned thereby, and that said company will not exercise or attempt to exercise any privilege in connection with or upon any portion of the ground covered by such shed other than the purpose for which such license to occupy the same was granted as aforesaid, and that said company will not sublet any portion of said grounds or assign this license and permission without the written consent of said city duly given by order of her city council.

At the expiration of the said term said company shall have the right to remove said shed if they so desire, provided the same be done within ten days after the expiration of said term; otherwise the same shall be and become the property of said city.

In testimony whereof the said city Little Rock, by order of her city council, has caused these presents to be executed by the
345 mayor and attested by the city clerk of said city, with the seal of said city attached, and said company has caused these

presents to be signed by its president and attested by its secretary, with its corporate seal affixed, this 5th day of July, 1883.

(Signed) FREDERICK KRAMER, *Mayor.*

Attest:

[SEAL.] H. C. JONES, *City Clerk.*

(Signed) LITTLE ROCK OIL & COMPRESS COMPANY,
E. URGUHART, *President.*

Attest:

[SEAL.] W. H. WRIGHT,
Sec'y & Tr. Little Rock Oil and Compress Co.

I, H. C. Jones, city clerk of the city of Little Rock, Arkansas, do hereby certify that the foregoing is a true and correct copy of the instrument therein set forth, and the same appears of record in my office.

346 Witness my hand and the official seal of my office this the 6th day of July, 1883.

[SEAL.] H. C. JONES, *City Clerk.*

To the introduction of said petition and lease in evidence plaintiff, at the time and in proper manner, objected as incompetent and irrelevant, and the said objection was by the court sustained and the lease and petition excluded; to which ruling of the court the said defendant then and there excepted.

The defendant then offered to prove by W. H. Wright, president of the Union Compress Company, and others that the Union Compress Co. held said lease by purchase, assignments, and transfer from the said Little Rock Oil and Compress Company, and that said Union Compress Company, by virtue of said lease, had held

347 said street and had placed said cotton within and upon the same; but said evidence was objected to by the plaintiff as incompetent and irrelevant, and the court sustained the same; to which ruling of the court in sustaining said objection and excluding said evidence the defendant, by its counsel, then and there duly excepted.

The defendant then read in evidence, without objection, an ordinance of the city of Little Rock granting the Cairo and Fulton Railroad Company the right to construct, maintain, and operate its railway through the streets of the said city of Little Rock, Arkansas, said ordinance being dated November 30th, 1853; and also read in evidence the articles of consolidation showing that the Cairo and Fulton railroad and the St. Louis and Iron Mountain Railway Company of Missouri were, on the 30th of April, 1884, duly and

348 legally consolidated under the laws of Arkansas and Missouri, and as thus consolidated formed The St. Louis, Iron Mountain and Southern Railway Company, the defendant herein; and that by reason of said consolidation the defendant company had succeeded to and held all the rights, privileges, and franchises

and property of the said Cairo and Fulton Railroad Company, under the laws of the State of Arkansas, including the tracks running through the streets of the city of Little Rock.

Defendant then introduced in evidence and read without objection an ordinance of the city of Little Rock, dated December 24th, 1879, duly passed, granting the Little Rock, Mississippi River and Texas Railway Company the right to construct, maintain, and operate its railroad through the limits of the city of Little Rock, from
349 the depot of the said railroad, "along and upon Water street, and on the south bank of the Arkansas river," to the depot of The St. Louis, Iron Mountain and Southern Railway Company, the defendant herein, in the western part of the city of Little Rock, and that the St. Louis, Iron Mountain and Southern Railway Company by purchase duly acquired all the property, rights, franchises of said Little Rock, Mississippi River and Texas Railway Company long prior to the 14th November, 1887.

This was all the evidence introduced on either side. The evidence being closed, the defendant requested the court to declare the law to be as follows:

1st. If the Union Compress Company, who is not sued in this action, was the owner, holder, and in actual possession and control and management of the compress warehouse and its contents,
350 located at the foot of Main street, in the city of Little Rock, on November 14th, 1887, and if the defendant railway company had at that time no control or custody of and exercised no right of management or ownership over said warehouse or its contents, then the mere fact that it had a lot of cotton there for which it had no receipts of said compress company would not make the defendant railway company liable for any damages growing out of the negligent burning of said compress company's warehouses if caused by negligence or want of ordinary care in the management of the same by the Union Compress Company and without any fault on the part of the defendant proximately contributory to said injury.

The court refused to give said instruction, and defendant, by its counsel, then and there duly excepted to said ruling
351 of the court.

2d. If the plaintiff insurance companies, at the time the insurance in question was taken out, insured the cotton and undertook to indemnify the insured against the destruction of the cotton by fire while the same was so placed and deposited in the street under such circumstances, that so placing and depositing the same constituted a public nuisance, then the plaintiff insurance companies, by their conduct aforesaid, aided and co-operated in maintaining such public nuisance, and cannot recover in this action, because by their conduct plaintiffs contributed directly to the cause of the loss.

The court refused to give said instruction, and defendant, by its counsel, then and there duly excepted to said ruling.

3d. The jury are instructed that it is a rule of evidence
352 that the plaintiff must make out his case by a preponder-

ance or greater weight of testimony. In this case the plaintiff charges, among other things, that the fire which burned the cotton in question originated from sparks escaping from an engine of defendant's road. Before, therefore, it can recover on this ground it must establish the fact by a preponderance or greater weight of testimony.

The court refused to give said instruction, and defendant, by its counsel, then and there duly excepted to said ruling of the court.

4th. When the act or omission complained of as negligence is not in itself a distinct wrong to the party complaining and can only become a wrong to any particular individual through injurious consequences resulting therefrom by or through the separate acts
353 of others, there would be no liability upon the party originally committing the act or making the omission unless it appears from the evidence that the injurious consequences arising therefrom were the natural results, in the ordinary course of events, of such act or omission.

The court refused to give said instruction, and defendant, by its counsel, then and there duly excepted to said ruling of the court.

5th. If at the time said cotton was burned, on the 14th of November, 1887, at the foot of Main street, it was in the custody, possession, and control of the Union Compress Company, and upon premises over which the defendant railway company had no control, and if it owed no duty as a common carrier in relation to said cotton, and if, while in such custody and control, the cotton was set on fire by the act of some unknown person, with whom the de-
354 fendant had no connection and of whom it had no knowledge, then the defendant railroad company cannot be held liable in this action.

The court refused to give said instruction, and defendant, by its counsel, then and there duly excepted to said ruling of the court.

6th. If at the time of the making of the contract or agreement between the defendant and the compress company for the transportation of cotton from the warehouse of the compress company at the foot of Main street to its compress, in Argenta, defendant had reasonable ground to believe that it would be enabled to transport such cotton as should be stored at the foot of Main street to the compress at Argenta with reasonable despatch, and that such
355 additional means of transportation were provided by the defendant as would have been sufficient during an ordinary season to have enabled it to have moved said cotton with reasonable despatch, and if all reasonable efforts were employed by the defendant to remove the same within the usual and ordinary time, and the delay was solely occasioned by the extraordinary and unusual influx of cotton upon the lines of defendant and its connecting lines, so that it was thereby rendered impossible for the defendant, with proper diligence on its part, to procure cars to transport said cotton within a reasonable time, the defendant would not in that event be guilty of negligence or responsible for the delay in moving the cotton.

The court refused to give said instruction, and defendant,

356 by its counsel, then and there excepted to said ruling of the court.

7th. The court instructs the jury that the plaintiff in this action has and holds no greater right to recover in this suit than he obtained by the right of subrogation from Sam. O. Smith & Co. by reason of having paid the insurance for the cotton destroyed.

If, therefore, the jury find that the said Sam. O. Smith & Co. were guilty in any manner of creating or assisting in creating the nuisance complained of or in maintaining or assisting to maintain the same, or were in any respects a party to the maintenance of the same, then they were parties to the creation and maintenance of said nuisance and bars the plaintiff's right of action in this case, and, if you so find, your verdict must be for the defendant.

357 The court refused to give said instruction, and defendant, by its counsel, then and there duly excepted to said ruling of the court.

8th. If the jury find from the evidence that Sam. O. Smith & Co., to whose rights the plaintiffs are subrogated, were guilty of contributory negligence, either in the erection or the maintenance of the nuisance upon which this action is based or were a party to the same, then their contributory negligence is a complete defense to this action, and your verdict must be for the defendant.

The court refused to give said instruction, and defendant, by its counsel, then and there duly excepted to said ruling of the court.

9th. If the insured, Sam. O. Smith & Co., deposited the
358 cotton sued for in the warehouse at the foot of Main street, prior to the time that it was ready for shipment, for the purpose of storing it at the sheds of the compress and warehouse company until they could succeed in accumulating sufficient quantities to enable them to ship it in graded lots, and if this was done against the rules of the compress company and over its objection and with knowledge of the blockade which existed at the warehouse and of the danger to which the cotton would be exposed, they were guilty of contributory negligence, and the plaintiff cannot recover in this action.

The court refused to give said instruction, and defendant, by its counsel, then and there excepted to said ruling of the court.

10th. If the jury believe from the evidence that the Union
359 Compress Company allowed cotton to accumulate in its warehouse and neighborhood at the foot of North Main street in such quantities as to constitute a nuisance, without the assent or direction of the defendant company, and that the said compress company knew at the time that there would be delay on the part of the defendant in furnishing transportation to remove the same, and if you further believe that the defendant company had no management or control over said warehouse, nor over the delivery to or receipt by said compress company of cotton at that point, then the defendant company cannot be chargeable with the creation or maintenance of a nuisance, if any such nuisance then was, and on this point you will find for the defendant.

The court refused to give said instruction, and defendant,

360 by its counsel, then and there duly excepted to said ruling of the court.

11th. If the jury find from the evidence that there was no contract or arrangement between the railway company and the compress company which contemplated the depositing of cotton in and upon Main street, but that the placing of cotton there and the permitting of it to be placed there was the sole act of the compress company and the owners of the cotton, and that the railway company had no control over the premises where the cotton was stored, then the defendant is not liable in this suit, even though the depositing of cotton in and upon Main street constituted a public nuisance.

The court refused to give said instruction, and defendant,
361 by its counsel, then and there duly excepted to said ruling of the court.

12th. In order to make the defendant liable for the placing of cotton in and upon Main street the jury must find from the evidence that the defendant was a party to the arrangement or agreement by which the cotton was deposited in and upon said street, and the mere fact that an arrangement existed by which the defendant issued bills of lading for cotton deposited in the compress warehouses and had agreed to handle the same from said warehouses to Argenta, this fact of itself will not make the defendant liable for an injury which would not have happened except for the placing of cotton on the street itself.

The court refused to give said instruction, and defendant,
362 by its counsel, then and there duly excepted to said ruling of the court.

13th. If the jury believe from the evidence that on the 14th day of November, 1887, a large quantity of cotton was destroyed which was stored in the street at the foot of Main street without authority from the authorities of the city of Little Rock, and that by reason of said nuisance the fire complained of was caused and created by which the damage claimed was suffered, nevertheless the jury cannot find the defendant railway company liable for the said injury unless they find that said defendant railway company either created said nuisance or authorized the same or was a party to the creation and maintenance of the same.

The court refused to give said instruction, and defendant,
363 by its counsel, then and there duly excepted to said ruling of the court.

14th. If the jury find that the plaintiffs, at the time of the issuance of the policy of insurance introduced in evidence in this cause, had not and have never up to this date filed in the office of the secretary of state certificates designating an agent upon whom service of summons and other process may be made, or certificate stating the principal place of business of each plaintiff in this State, as required by the statute of the State, it cannot maintain this action.

The court refused to give said instruction, and defendant, by its counsel, then and there duly excepted to said ruling of the court.

The court thereupon, upon its own motion, charged the jury as follows:

364 1. "The complaint charges that the defendant and the Union Compress Company, by an agreement between themselves and by a general course of business, made the cotton sheds of the compress company at the foot of Main street a receiving station for cotton to be sent from this city by any one to the compress of said Union Compress Company in Argenta for compression, and that defendant should transport all cotton thus received, and that the defendant failed to transport the cotton thus received promptly, but suffered it to accumulate at said cotton sheds and in Main street, a public highway of the city, until it became a public nuisance, and was set on fire in Main street, and that by reason of said fire the cotton insured by it, mentioned in the complaint, was destroyed.

365 "The agreement mentioned in the complaint between the Union Compress Company and the defendant is admitted in the answer, and it is also admitted that the cotton did accumulate in said cotton sheds and at the foot of Main street and in said street, and that it was fired in said street; but the defendant alleges that it is not responsible for the loss of the cotton mentioned in the complaint because, owing to an unexpected demand on it for cars for the transportation of freight in the months of September, October, and November, 1887, it could not furnish the means for transportation of the cotton received at the said cotton sheds promptly, according to its agreement.

The court now instructs you that by the said agreement it was the duty of the said defendant to transport the cotton thus

366 received at said cotton sheds for shipment promptly to Argenta, and that if defendant failed to do so and by reason of the continued reception of cotton at said sheds and the continued giving of bills of lading therefor as often as demanded by shippers thereof, down to the day of the fire, cotton was suffered to accumulate at said sheds and on Main street until it endangered the property of others in the immediate vicinity and that mentioned in the complaint, then said defendant was guilty of aiding in the creation & maintenance of a public nuisance, and is liable for the loss mentioned in the complaint, and its defense that it was hindered from transporting said cotton from the foot of Main street by reason of an unexpected pressure of business is not sustained by the evidence.

367 2. The defendant has pleaded further that it is not liable for the injury complained of in this case because plaintiffs and Sam. O. Smith & Co., by their own negligence, contributed to said loss of said cotton; but the court instructs you that there is no evidence to sustain this defense.

3. If the jury find that the defendant was guilty of aiding in creating, maintaining, or continuing said nuisance as aforesaid, and the cotton mentioned in said complaint was destroyed by reason thereof, and the jury find that at the time of its loss it was insured against fire by the plaintiffs, and that plaintiffs have since that time

and before the bringing of this suit paid the amount of said loss to the insurer, that being the full value of the cotton, the jury will find for the plaintiff- and will assess their damages at the sums
368 thus paid by them, with interest at the rate of six per centum per annum from the date of such payment until the present time.

The defendant has pleaded that the policies of insurance mentioned in the complaint were void because the plaintiffs had not complied with the laws of this State. Upon the evidence this defense is not sustained, and on that issue the jury will find for the plaintiff-."

To paragraph 1 of said charge the defendant then and there, by its counsel, duly excepted, and it especially excepted to that part of said paragraph of said charge which reads as follows:

"The agreement mentioned in the complaint between the
369 Union Compress Company and the defendant is admitted in the answer," and especially to the further part of said charge which reads as follows: "The court now instructs you that by said agreement it was the duty of the said defendant to transport the cotton thus received at said cotton sheds for shipment promptly to Argenta, and that if defendant failed to do so, and by reason of the continued reception of cotton at said sheds and the continued giving of bills of lading therefor as often as demanded by shippers thereof, down to the day of the fire, cotton was suffered to accumulate at said sheds and on Main street until it endangered the property of others in the immediate vicinity and that mentioned in the complaint, then said defendant was guilty of aiding in the crea-
370 tion and maintenance of a public nuisance and is liable for the loss mentioned in the complaint, and its defense that it was hindered from transporting said cotton from the foot of Main street by reason of the unexpected pressure of business is not sustained by the evidence;" but the court overruled the defendant's objections, in proper time and proper manner duly made, and gave said charge; to which rulings of the court defendant, by its counsel, then and there duly excepted, and now tenders its bill of exceptions.

And to the second paragraph of said charge the defendant, by its counsel, then and there duly excepted, and now tenders its bill of exceptions.

And to the third paragraph of said charge the defendant at
371 the proper time and in the proper manner duly excepted, and likewise tenders its bill of exceptions.

The jury returned a verdict in favor of the plaintiff for the sum of eighteen thousand eight hundred and sixty-four dollars and four cents (18,864.04). Whereupon said defendant comes and prays the court that this bill of exceptions may be signed, sealed, and made a part of the record roll in said case named in the caption, which upon examination is found correct and accordingly done.

HENRY C. CALDWELL, *Judge.*

COMMERCIAL UNION INS. CO. *et al.*
v.
ST. LOUIS, I. M. & S. R. CO.

Mess. Dodge & Johnson:

372 I have examined the bill of exceptions in this case and I think that it is correct.

Very truly, U. M. ROSE.

April 9, 1890.

Filed April 5, 1890.

RALPH L. GOODRICH, *Clerk.*

373 Which supersedeas bond is as follows:

In the United States Circuit Court for the Eastern District of Arkansas.

COMMERCIAL UNION INSURANCE COMPANY and Others
vs.
ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

Know all men by these presents that we, The St. Louis, Iron Mountain & Southern Railway Company and Logan H. Roots and G. H. Meade, both of the city of Little Rock, county of Pulaski, and State of Arkansas, are held and firmly bound unto the above-named Commercial Union Insurance Company and others in the sum of twenty-five thousand dollars, to be paid to the said Commer-

374 cial Union Insurance Company and others; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 5th day of April, in the year of our Lord 1890.

Whereas the above-named St. Louis, Iron Mountain and Southern Railway Company has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the eastern district of Arkansas:

Now, therefore, the condition of this obligation is such that if the above-named St. Louis, Iron Mountain & Southern Railway Company shall prosecute said appeal to effect and answer all

375 damages and costs if he fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN R'Y CO.,
By DODGE & JOHNSON,
Attorneys of Record.
LOGAN H. ROOTS.
G. H. MEADE.

Witnessed by—
GEORGE E. DODGE.

Approved and to operate as a supersedeas.
April 5, 1890.

HENRY C. CALDWELL, *Judge.*

The above bond is good.
April 5, 1890.

U. M. & G. B. ROSE.

Endorsed: Filed April 5, 1890. Ralph L. Goodrich, clerk.

Which citation is as follows:

376 The United States of America to the Commercial Union Insurance Company, the Sun Mutual Insurance Company, and Insurance Company of North America and U. M. and G. B. Rose and E. W. Kimball, attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western division, eastern district of Arkansas, wherein St. Louis, Iron Mountain and Southern Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

The Seal of the Circuit Court, Western Division of East. Dist. Ark., U. S. A.

Witness the Honorable Henry C. Caldwell, judge of the circuit court, this 5th day of April, A. D. 1890.

HENRY C. CALDWELL, *Judge.*

Service acknowledged.
U. M. & G. B. ROSE,
For Def't- in Error.

377 In the Supreme Court of the United States.

THE COMMERCIAL UNION INSURANCE COMPANY *et als.*, Defendants in Error,
advs.
ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Plaintiff in Error.

The plaintiff in error makes the following assignment of errors in the above-entitled cause:

1st. The court erred in overruling defendant's motion to compel plaintiffs to make their complaint more specific and to file their policies of insurance as exhibits to their complaint.

2nd. The court erred in overruling defendant's plea of non-joinder filed herein.

3rd. The court erred in overruling the demurrer filed by defendant to each of the paragraphs of plaintiffs' complaint herein.

4th. The court erred in permitting, over defendant's ob-
378 jection, the testimony of H. G. Vanetten, C. E. Ferguson, J. W. Coy, and J. H. Trump to go to the jury, wherein it was attempted to show that there had been a shortage of cars on defendant's road during the years 1886 and 1887, prior to the fire, and that consequently caused delay in the shipment of lumber over defendant's road when offered by the lumber mills in the State of Arkansas during those years.

5th. The court erred in permitting plaintiffs, over defendant's objection, to read to the jury the ordinance of the city of Little Rock—No. of section, 596—forbidding all persons from encumbering or obstructing any street, alley, or public place in the city of Little Rock.

6th. The court erred in permitting plaintiffs, over defendant's objection, to read to the jury the proclamation of the mayor of the city of Little Rock ordering all persons within the corporate limits to remove all bales of cotton from the streets and alleys in said city and from storing their cotton or property therein.

379 7th. The court erred in permitting the plaintiffs, over defendant's objection, to read to the jury a release executed by G. W. Martin and others to the defendant railway company releasing said railway company from liability for the value of said cotton burned in excess of the amount paid by the plaintiffs, said receipt having been given during the progress of the trial and upon consideration paid by plaintiffs.

8th. The court erred in refusing to permit the defendant to read in evidence a written petition from the Little Rock Oil & Compress Company to the city of Little Rock, Ark., and a lease executed by the city of Little Rock to the Little Rock Oil and Compress Company and by said company assigned and transferred to the Union Compress Company, wherein the said city leased for a term of years all that part north of Main street lying between its warehouses near and adjacent to defendant's railway tracks.

380 9th. The court erred in refusing to permit defendant to prove that at the time of the fire the Union Compress Company held, occupied, and used North Main street under and by authority of a written lease made and executed to it and its assignors, in writing, by the city council of the city of Little Rock.

10th. The court erred in refusing to give the first instruction asked for by the defendant.

11th. The court erred in refusing to give the second instruction asked for by the defendant.

12th. The court erred in refusing to give the third instruction asked for by the defendant.

13th. The court erred in refusing to give the fourth instruction asked for by the defendant.

14th. The court erred in refusing to give the fifth instruction asked for by the defendant.

15th. The court erred in refusing to give the sixth instruction asked for by the defendant.

16th. The court erred in refusing to give the seventh instruction asked for by the defendant.

381 17th. The court erred in refusing to give the eighth instruction asked for by the defendant.

18th. The court erred in refusing to give the ninth instruction asked for by the defendant.

19th. The court erred in refusing to give the tenth instruction asked for by the defendant.

20th. The court erred in refusing to give the eleventh instruction asked for by the defendant.

21st. The court erred in refusing to give the twelfth instruction asked for by the defendant.

22nd. The court erred in refusing to give the thirteenth instruction asked for by the defendant.

23rd. The court erred in refusing to give the fourteenth instruction asked for by the defendant.

24th. The court erred in giving its charge to the jury as set out in paragraph numbered (1) of said charge, and especially in giving that portion of the charge specifically set out in the bill of exceptions on page 368 of the record.

382 25th. The court erred in giving in its charge to the jury the second paragraph of said charge, which is specifically set out in the bill of exceptions.

26th. The court erred in giving to the jury the third paragraph of its charge, as set out specifically in the bill of exceptions, and to which exceptions were properly taken at the time and duly allowed.

27th. The court erred in taking the case from the jury and finding the facts therein, thus virtually rendering a verdict without the aid of the jury.

Wherefore the defendant prays that the judgment rendered in this cause be reversed, set aside, and held for naught.

(Signed) DODGE & JOHNSON,
Att'ys for Plaintiff in Error.

Endorsed: Filed April 5, 1890. Ralph L. Goodrich, clerk, by W. P. Feild, D. C.

383 UNITED STATES OF AMERICA, }
Western Division of the Eastern District of Arkansas. }

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the western division of the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct, and compared copies of the original remaining of record in my office, and constitute a true copy of the record and of the assignment of errors and of all proceedings in the case of Commercial Union Assurance Co. against St. Louis, Iron Mountain & Southern Railway Co.

The Seal of the Circuit Court, Western Division of East. Dist. Ark., U. S. A.

In witness whereof I have hereunto set my hand and the seal of said court this 18th day of April, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States of America the one hundred and fourteenth.

Attest: RALPH L. GOODRICH, *Clerk.*

Endorsed on cover: E. Arkansas C. C. U. S. No. 1626. The St. Louis, Iron Mountain & Southern Railway Company, plaintiff in error, *vs.* The Commercial Union Insurance Company *et al.* Filed May 13, 1890.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1169.

THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,

Plaintiff in Error,

vs.

THE COMMERCIAL UNION INSURANCE COMPANY ET AL.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN F. DILLON,
HARRY HUBBARD,
For the Plaintiff in Error.

The Seal of the Circuit Court, Western Division of East. Dist. Ark., U. S. A.

In witness whereof I have hereunto set my hand and the seal of said court this 18th day of April, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States of America the one hundred and fourteenth.

Attest: RALPH L. GOODRICH, *Clerk.*

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1169.

THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,

Plaintiff in Error,

vs.

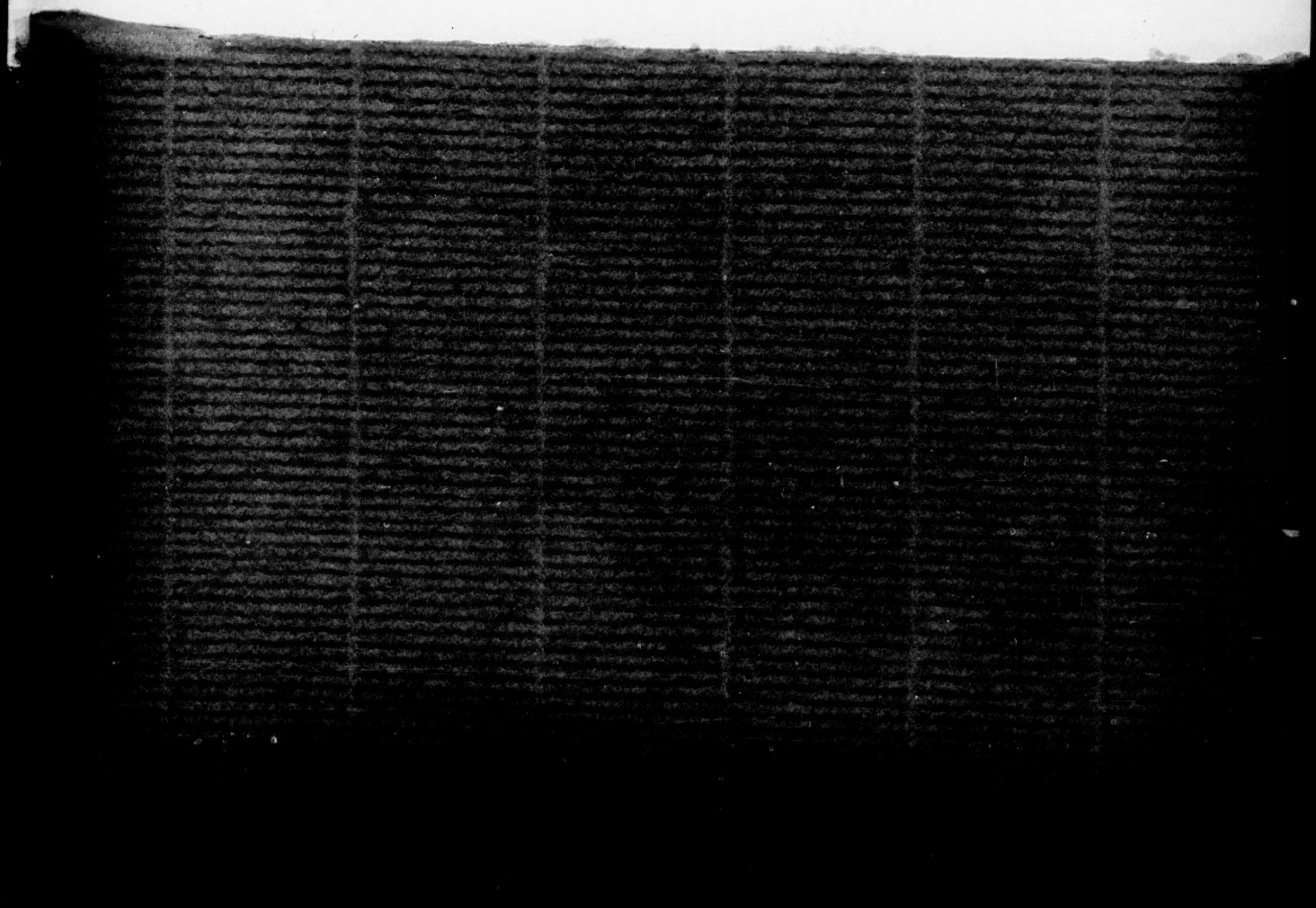
THE COMMERCIAL UNION INSURANCE COMPANY ET ALS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN F. DILLON,
HARRY HUBBARD,
For the Plaintiff in Error.

C. G. Burgoyne, 146-150 Centre Street, N. Y.



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I. If there was on the facts of this case any liability on the part of the Railway Company (which we deny), the plaintiff insurance companies cannot maintain this action *in their own names.* Whatever rights they have acquired against the Railway Company have been acquired by the issuing of the policies, their payment of losses to, and subrogation to the rights of, the insured; and if there was any cause of action, it can be asserted in an action at law *only in the name of the insured* 18

There is nothing in the Arkansas Statutes changing the rule of common law that an action like the present one must be brought in the name of the insured 27

II. The plaintiff insurance companies cannot maintain this action for the reason that they have not complied with the laws of Arkansas as to the terms upon which foreign corporations are permitted to do business in that State,

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and the statute expressly renders their contracts void in such a case; and as the contracts or policies of insurance were illegal and void, no right of subrogation can arise therefrom 42

The Statute quoted 42

III. The Release.

(A) The Court erred in admitting in evidence the release by Sam. O. Smith & Co. (the owners of the cotton destroyed) to the defendant Railway Company, for this release showed on its face that it was made after the action was begun, and the release was not set up in the pleadings 51

(B) But if the release was admissible in evidence, it showed that the plaintiffs had no cause of action, and for this reason the Court erred in the instructions which it gave 53

IV. The Court below should have instructed the jury, in substance, that (as the evidence showed that the defendant did not occupy the relation of common carrier, and hence of insurer of the cotton in question) in order to render the defendant Railway Company liable in this action it must be shown that the destruction of the cotton was caused by the act or neglect of the Railway Company, and that if the cotton was destroyed by any other cause or causes the defendant was not liable; also, that the act or neglect of the Railway Company, in order to render it liable, must have been the proximate and not a remote cause of the injury. On these

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points the Court below erred, both in its refusals to instruct the jury and in the instructions which it gave 56

(A) The Railway Company did not bear the relation of common carrier to the cotton involved in this action; hence it is liable for the destruction of the cotton in question only in case its act or neglect has been such as would render liable any third person who had been guilty of the same act or neglect.. 57

(B) The defendant Railway Company would not be liable for the destruction of the cotton by reason of its failure to transport the cotton promptly. The failure to do so was not the proximate cause or any cause of the destruction of the cotton 64

(C) The Court erred in taking from the consideration of the jury the evidence which showed that the failure of the Railway Company to furnish transportation promptly, if there was any such failure (which it denies), was not caused by its negligence, but by the unprecedented cotton crop of 1887; also in treating the subject of negligence as a matter of defense and assuming that the burden of proof was on the defendant 73

V. The plaintiff insurance companies cannot maintain this action, for the reason that Sam. O. Smith & Co., the owners of the cotton, with full knowledge of all the facts as to the accumulation and condition of the cotton in the Compress

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Company's warehouse, and the danger to which it would be exposed, voluntarily placed their cotton there within the danger, and thus consented and contributed to the placing and keeping of the cotton in the place and manner in which it was kept, of which acts plaintiffs now complain as negligence 76

VI. Plaintiff insurance companies, when they issued their policies of insurance upon the cotton of Sam. O. Smith & Co., in question in this suit, had full knowledge of the accumulation and condition of the cotton in the Compress Company's warehouse; and, by issuing the policies with such knowledge, charging and receiving an extra premium therefor, two distinct legal consequences followed: *1st.* They waived any and all right to complain that the keeping of the cotton in such place and manner was negligence, and *2d*, the equity to a subrogation to the rights of the assured was thereby rebutted and destroyed. 81

VII. The testimony of the witnesses, H. G. Van Etten (Van Elten), C. E. Ferguson, L. W. Coy and J. H. Trump, as to an alleged failure of the Railway Company to supply sufficient cars for lumber shippers was irrelevant and collateral to the issue before the jury, and hence inadmissible as evidence, and it was error to admit it over the objection and exception of the defendant 86

VIII. The Court below erred in admitting in evidence the ordinance of the City of Little Rock, and Mayor's proclamation, set out at pages 66–67 of the Record 89

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IX. The Court should have admitted in evidence the petition and lease set out at pages 113–115 of the Record 90

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X. For the reasons above stated this Court should reverse the judgment of the Circuit Court, and either direct that Court to dismiss the complaint or to grant a new trial, as to this Court shall seem proper 93

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1890.

No. 1169.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE COMMERCIAL UNION INSURANCE COMPANY ET ALS.

Brief for Plaintiff in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

STATEMENT OF THE CASE.

This case comes to this court on a writ of error to the Circuit Court of the United States for the Eastern District of Arkansas (Record, p. 1). Final judgment was rendered by the Circuit Court against the Railway Company, the defendant below, for the sum of $18,-864.04 (Record, p. 11).

The Pleadings.

THE COMPLAINT. The plaintiffs below—the Commercial Union Insurance Company, the Sun Mutual Insurance Company, and the Insurance Company of

North America—filed their complaint September 21, 1889 (Record, p. 1), in which they allege substantially as follows: That they are corporations created by the laws of England, Louisiana and Pennsylvania respectively, and that the defendant is a corporation created by the laws of Arkansas; that prior to September 20, 1887, the Union Compress Company was engaged in compressing bales of cotton for transportation; that the compress of said company was situated at Argenta, opposite Little Rock; that the defendant was a common carrier operating a railway from Little Rock to Argenta; that prior to that time said defendant had agreed with said Compress Company, in consideration of a certain sum of money to be paid to it by said Compress Company for each and every car-load of cotton to be transported by it under said agreement, that the said defendant would receive all the cotton in bales that might be brought to the sheds of said Compress Company in Little Rock; and that it would transport the same from thence to said compress in Argenta, a distance of about a mile and a half. The complaint then goes on to allege the character and location of the sheds of the Compress Company in Little Rock, where the Compress Company received the cotton, and also alleges that the defendant made the said sheds a receiving station of its road for all cotton in common or uncompressed bales that might be delivered there, and issued bills of lading for the same to all persons depositing cotton there and applying therefor. The complaint then alleges that while said contract was in force one Sam. O. Smith placed 340 bales of uncompressed cotton in the care and custody of said Compress Company at Little Rock with a view to its future compression and shipment, in accordance with the terms of said agreement, which had been so long acted on as to become a custom well known to all persons engaged in handling and shipping cotton in Little Rock, the said 340 bales being then and there of the value of $17,000; that while the cotton was so deposited the plaintiffs, each for itself, issued a policy of insurance against fire for the use of the Compress Company and the owner of the cotton, for a period beyond the time when the cotton was destroyed, said policies covering the entire value of said 340 bales of cotton; that the sheds of the Compress Company

were crowded with the cotton that accumulated there during October and November, 1887, for the reason that defendant did not, within a reasonable time, remove the cotton that was received there in the sheds of said Compress Company; that the weather was dry and the cotton was exposed to danger from fire; that owing to the accumulation of cotton, it was placed in the street between the sheds of the Compress Company on either side of said street, and that the accumulation of cotton at the sheds and in the street constituted a public nuisance creating great danger of fire; that at the time of the fire hereafter mentioned there were about 4,000 bales of cotton in said sheds for which the defendant had issued bills of lading; that the cotton in said street was fired by some one to the plaintiffs unknown, either wilfully or negligently; that by reason of said fire the said cotton was totally destroyed, within the risk insured against in said policies, the total value thereof being covered by the same; that thereupon said Smith proved his loss of said cotton, upon which plaintiffs paid him the full amount thereof, each one paying its own lawful *pro rata.*

The complaint also stated the alleged cause of action as follows:

"II. And for a different statement of the same cause of action said plaintiff says that prior to the 14th day of November, 1887, Sam. O. Smith had deposited in the sheds of the Union Compress Company, in the City of Little Rock, 340 bales of cotton of the value of seventeen thousand dollars, and that while they were thus deposited plaintiff, on the application of said Smith, insured them against loss by fire for their full value; that from the 20th day of October until the 14th day of November, 1887, said defendant and the said Union Compress Company, by their joint act, caused many other bales of cotton to be piled in the public street of said city adjoining said cotton sheds, so as to greatly obstruct the public use of said street, and so created a public nuisance, which was continued for three weeks or more, until the said 14th day of November, 1887, when said cotton in said street was fired, accidentally or otherwise, by some person unknown to the plaintiffs, and that said fire was communicated to said shed and

destroyed the same, together with said cotton of said Smith deposited therein, and that as said loss of said cotton was within the risk of said policy said Smith proved up his said loss and the plaintiffs paid him the same, amounting to seventeen thousand dollars, on the day of January, 1888."

"Wherefore, plaintiffs pray that they may have judgment againt said defendant for said sum of money so paid by them as aforesaid, with interest and costs."

MOTION. October 30, 1889, defendant filed its motion to make the complaint more specific (Record, pp. 5, 12), which motion was overruled, the defendant excepting to said ruling and making its exceptions a part of this Bill of Exceptions (Record, pp. 6, 12).

PLEA OF NON-JOINDER. November 1, 1889, defendant filed its plea of non-joinder (Record, pp. 12–13).

The plea of non-joinder was (Record, p. 12):

"That Sam. O. Smith, to whom the policy of insurance, alleged in the complaint, was issued, and to whom the said insurance was paid by plaintiffs, is a necessary party to this action, and the same is not joined therein. Therefore, they would pray that plaintiffs be required to make the said Sam. O. Smith party to this action. Wherefore, it prays, &c."

After argument said plea was overruled by the Court, to which ruling defendant excepted and made its exceptions part of this Bill of Exceptions (Record, pp. 6, 12).

DEMURRER TO COMPLAINT. Thereupon the defendant filed its demurrer to each of the paragraphs of the complaint, as well as a general demurrer to the whole com-

plaint which demurrer is in words as follows, to wit (Record, pp. 12–13):

"For demurrer to first paragraph of plaintiffs' complaint, defendant says:

I.

1st. That there is a defect of parties plaintiffs in this action, in this, that the assured, under whom plaintiffs claim their right, are not made parties hereto.

2d. That the same does not state facts sufficient to constitute a cause of action in favor of plaintiffs.

II.

1st. To the second paragraph defendant, for demurrer, says that there is a defect of parties plaintiffs in this action, in this, that the assured, under whom plaintiffs claim, are not made parties thereto.

2d. Because the said paragraph does not state facts sufficient to constitute a cause of action in favor of plaintiffs."

This demurrer was overruled by the Court after argument by counsel, to which ruling defendant duly, at the proper time and in the proper manner, excepted, as appears by the judgment roll herein, and has made its exceptions part of this Bill of Exceptions.

THE ANSWER. Thereupon defendant filed its answer to the complaint (Record, pp. 13, 7–10). The only parts of the answer that need be specially mentioned here are substantially as follows: Defendant admitted and stated certain facts in regard to the business of the Union Compress Company and the location of its buildings, and that the defendant's line of railway ran alongside the Compress Company's warehouse at the foot of Main street. The answer expressly

"Denies that it ever made any contract with the said Union Compress Company by which it agreed or held out any inducement to the said Compress Company or the public to receive cotton at its compress and warehouses at the foot of Main street in the City of Little Rock, or anywhere else."

The answer states that the defendant gave the Union Compress Company a certain rate per carload, whereby it agreed to haul cotton for the Compress Company from its warehouse at the foot of Main street, and elsewhere in Little Rock, to its compress in Argenta [that is, the Railway Company merely *fixed a rate* for hauling whatever cotton it might haul for the Compress Company between the places named].

The answer then states certain facts as to the erection, operation and control of the Compress Company's compress buildings and warehouses.

It "denies that it (the Railway Company) had any part in the erection or control of the said compress buildings, warehouses or sheds at the foot of Main street;" also "denies that it made the said Union Compress Company's buildings and warehouses or sheds a receiving station of its road;" also "denies that it ever had any interest or claim to or control over the said warehouses, sheds or buildings," or the ground upon which they were located; "but it says that the said property belonged entirely and exclusively to the Union Compress Company, in which this defendant had no interest whatever, and over which it had no control."

Defendant then states that the Union Compress Company received cotton at said point for compression and storage, and issued its warehouse receipts therefor to the owners of the cotton; that the various railway companies doing business at Little Rock would, at the request of the holders of the said warehouse receipts for cotton stored with the Union Compress Company, whether the cotton was so stored at the foot of Main street or elsewhere in Little Rock, or Argenta, take up the said receipts of the Compress Company and issue bills of lading to the shippers; that such cotton still continued to be held by the Compress Company for compression, and that it was well understood by the shippers of the cotton that the cotton was to remain in the possession and custody of the Compress Company until it should be compressed and prepared for shipment.

"Defendant denies that at the time of the said fire there were 4,000 bales of cotton in said sheds for which it had issued bills of lading, or that it had ever received

any of the cotton that was stored in said sheds, or that it had any control whatever over the same." "It denies that it ever held out any inducement to the owners or shippers of cotton to deliver the same at that point;" "it denies that this defendant ever suffered a large amount of cotton unreasonably to accumulate at the sheds of the Union Compress Company, or that it unreasonably neglected or refused to move said cotton, or that it had any control over the same in any manner whatsoever."

As to the 340 bales of cotton of Sam. O. Smith, or its value, or its insurance, or payments by plaintiffs on such insurance, the defendant's answer alleged that it had no knowledge or information, and therefore made a general denial. Defendant denied that it was in any way responsible for the accumulation of cotton or for the fire.

"It denies emphatically that this defendant, either alone or jointly with the Union Compress Company, caused the said bales of cotton to be piled in the public streets of the said City of Little Rock adjoining the said Union Compress Company's sheds and warehouses at the foot of Main street, or that it had any control over or interest in the said sheds, warehouses or streets adjacent thereto; it denies that it took any part of any kind or character in the creation of any public nuisance in the streets of Little Rock, if any was created there, on the 14th day of November, 1887, or prior thereto."

AND FOR FURTHER ANSWER to the first and second counts of said complaint defendant says:

"That if the said Sam. O. Smith stored their said cotton in the warehouses and sheds of the Union Compress Company at the foot of Main street at the time alleged in said complaint they did so with *a full and perfect knowledge that there was a large accumulation of cotton at said points,* and that the same was accumulating there faster than the said Compress Company could handle the same; that *said plaintiff and said Sam. O. Smith were aware of the mode and manner in which said cotton was stored, cared for, guarded and handled by the Union Compress Company,* and the said S. O. Smith was at the time a stockholder and officer in said Union Compress Company, and *the plaintiffs*

knowing all said facts insured said cotton in said Main street, and by their own acts in the premises contributed to the loss of said cotton, if any they did lose.

Defendant specifically denies all the allegations of carelessness or negligence either of omission or commission on its part as alleged and set up in the complaint, and says that it was guilty of no want of care in any respect whatever which would in any manner contribute to, approximately or otherwise, the cause of said fire on November 14, 1887.

AND FOR FURTHER AND COMPLETE DEFENSE to the action in this suit defendant says:

That the plaintiff is a foreign corporation doing business in the State of Arkansas; that prior to the making and entering into the contract upon which this action is based the said plaintiffs wholly failed, refused and neglected to comply with the conditions and provisions of an act of the General Assembly of Arkansas entitled "An Act to prescribe the conditions upon which foreign corporations may do business in this State," approved April 4, 1887; that by reason of said refusal and neglect to comply with the said statutes of this State the contract upon which this action is based is void, and the Courts are by law forbidden to enforce the same or any rights growing out of them in favor of said plaintiff. Wherefore, defendant says that said plaintiff has no legal capacity to institute this suit.

The case was then tried by a jury, who returned a verdict for plaintiff for $18,864.04, upon which judgment was rendered, as above stated (Record, p. 11).

The Facts.

We have made with great care the following brief, but believed to be an accurate, statement of the facts which the evidence showed or tended to show:

The Union Compress Company had some buildings or sheds at the foot and on either side of Main street

in the City of Little Rock (see Map, Record, p. 28). The business of compressing cotton had formerly been carried on there, but at the time of the fire and for some time previous the sheds and buildings at the foot of Main street had been used by the Compress Company as a warehouse. The Union Compress Company had a compress at Argenta, on the opposite side and just across the river from Little Rock, at which place it compressed the cotton delivered to it for compression (Record, p. 20 *et seq.*). The Compress Company received cotton at its warehouse at the foot of Main street, and issued warehouse receipts or tickets therefor, the same as any warehouse company would (Testimony of SAM. O. SMITH, Record, p. 38; and W. H. WRIGHT, Record, pp. 22 and 23). Dealers and other persons who had cotton were accustomed to deposit it in the Compress Company's warehouse at the foot of Main street until they sold it or until they brought other cotton there and made up graded lots for the market, using the Compress Company's warehouse as a storehouse for the cotton (Testimony of SAM. O. SMITH, Record, p. 17; of W. H. WRIGHT, Record, p. 27; A. P. HOWELL, Record, p. 32; and R. E. DOUGLASS, Record, pp. 36 and 37).

As a matter of convenience the defendant Railway Company, also other railway companies doing business in Little Rock, would, upon request, issue to owners of cotton its bills of lading in exchange for the warehouse receipts of the Compress Company while the cotton was still in the warehouse of the Compress Company and uncompressed (Testimony of W. H. WRIGHT, Record, pp. 22, 23, 27, 28; of SAM. O. SMITH, Record, pp. 38–40; and of S. W. TUCKER, Record, p. 41). The cotton

was transported from the Compress Company's warehouse at the foot of Main street to its compress building at Argenta by the defendant Railway Company (Testimony of W. H. WRIGHT, Record, p. 28). The Railway Company, for this purpose, placed its cars empty on a siding alongside of the Compress Company's warehouse at the foot of Main street, and after the Compress Company had loaded the cars the Railway Company hauled them away to Argenta (Testimony of W. H. WRIGHT, Record, p. 28; of A. C. STILLWELL, Record, pp. 54 and 55; and of SAM. O. SMITH, Record, p. 71). The Railway Company had no agent or representative at the Compress Company's sheds at the foot of Main street (Testimony of SAM. O. SMITH, Record, p. 71). The Railway Company did not have or exercise any control over the premises or business of the Compress Company or over the cotton stored in its warehouses, the only act of the Railway Company being to furnish cars alongside of the warehouse and to haul them away (Testimony, W. H. WRIGHT, Record, pp. 26 and 27; SAM. O. SMITH, Record, p. 40, 71; and A. R. BRAGG, Record, p. 74). The Railway Company had its own freight depots in Little Rock for the reception of freight (Testimony of W. H. WRIGHT, Record, p. 29). Some time in the fall of 1887 Sam. O. Smith, or Sam. O. Smith & Co., deposited 340 bales of cotton in the Compress Company's warehouse, taking that company's warehouse receipts therefor. *The Railway Company did not issue any bills of lading upon these 340 bales* (Testimony of SAM. O. SMITH, Record, p. 16). These 340 bales of cotton were placed there for the purpose of storing them until they should be sold; they were not intended for immediate shipment. Smith him-

self so testified (Testimony of SAM. O. SMITH, Record, p. 17). The accumulation of cotton at the Compress Company's warehouse at the foot of Main street was so great in the fall of 1887 that the Compress Company stored the cotton in its possession in Main street between its sheds or buildings, that part of Main street having been leased from the City of Little Rock for that purpose by the Little Rock Oil and Compress Company (which lease had been assigned to the Union Compress Company) (Record, pp. 113–115; testimony of W. H. WRIGHT, Record, p. 25; SAM. O. SMITH, Record, pp. 37 and 38; C. F. MARTIN, Record, pp. 40–41). A large part of the cotton thus placed in the street was exposed at the ends of the bales where the bales had been cut and the cotton had been sampled (Testimony of C. F. MARTIN, Record, p. 44; SAM. PRYOR, Record, p. 88). Of the cotton in the Compress Company's warehouse and in Main street at the time of the fire a part had been billed by the Railway Company and a part had not (Testimony of A. P. HOWELL, Record, p. 32; W. H. WRIGHT, Record, p. 22; R. E. DOUGLASS, Record, p. 37; SAM. O. SMITH, Record, p. 38). The amount that was billed was variously estimated; perhaps a third of it was billed by the Iron Mountain Company, and another third by the Memphis and Little Rock R. R. Co. (Testimony of SAM. O. SMITH, Record, p. 38; of S. W. TUCKER, Record, p. 42). *Sam. O. Smith, who was secretary of the Compress Company, knew the condition and accumulation of cotton at the foot of Main street when he put his cotton there* (Testimony, SAM. O. SMITH, Record, p. 17). The insurance companies also knew, at the time when they issued their policies—(the cotton in the

policies being described as "*in street.*" See policies set out at length, Record, pp. 13–15)—of the condition and accumulation of the cotton (Testimony of SAM. O. SMITH, Record, p. 18; of L. B. LEIGH, insurance agent, Record, p. 104; J. F. BOYLE, insurance agent, Record, p. 105), and charged an extra rate of premium on that account (Testimony of L. B. LEIGH, Record, pp. 104–105; J. F. BOYLE, Record, p. 105). The cotton crop of 1887 was unprecedented, being unusually large (Testimony of SAM. O. SMITH, Record, p. 71), and being brought to market unusually early in the season (Testimony of W. H. WRIGHT, Record, p. 27; A. P. HOWELL, Record, pp, 32, 33; SAM. O. SMITH, Record, pp. 40–41, 71–73; JOHN G. FLETCHER, Record, pp. 73 to 74; A. R. BRAGG, Record, p. 76). The accumulation and blockade of cotton existed elsewhere as well as at Little Rock (Testimony of A. P. HOWELL, Record, p. 32, bottom). There was evidence also that tended to show that the Compress Company had made some demands upon the Railway Company for transportation facilities for cotton, or complaints that such facilities were not furnished (Testimony of W. H. WRIGHT, Record, p. 24; A. P. HOWELL, Record, p. 31). No definite demands, however, were proved. Neither does it appear that any demand, definite or indefinite, was made for transportation facilities from the Compress Company's warehouse in Little Rock to its Compress at Argenta. On the contrary, there was testimony tending to show that such demand was not made (Testimony of C. W. HEQUEMBOURG, Record, pp. 100–101). All that appears from the testimony is, that some demands were made for transportation facilities for cotton generally. However, a large part of the cotton stored at the foot of

Main street was not intended for immediate shipment (Testimony of SAM. O. SMITH, Record, p. 17; R. E. DOUGLASS, p. 36). There was evidence to show that if the cotton crop of 1887 had not been an unprecedented one, both in size and early maturity, there would have been plenty of transportation facilities to meet all the demands which the Compress Company might have made (Testimony of C. W. HEQUEMBOURG, Record, p. 94; A. R. BRAGG, Record, p. 76). There was also evidence to show that the Railway Company, for the purpose of meeting any natural increase in traffic, increased its equipment in 1887 over that of 1886, by three or four thousand cars (Testimony of A. R. BRAGG, Record, pp. 76–77; C. W. HEQUEMBOURG, Record, pp. 93–99); also testimony that the Railway Company did all that was in its power to furnish transportation facilities for the Compress Company (Testimony of C. W. HEQUEMBOURG, Record, pp. 93–104). The testimony shows that people were continually passing along Main street, in the gangway which was left between the bales of cotton, smoking cigars, pipes and cigarettes (Testimony of HENRY LEE, Record, p. 55; SAM. PRYOR, Record, p. 56; THOMAS BARBER, Record, pp. 56–57; M. T. HUFF, Record, p. 57; JOHN FRANKLIN, Record, p. 66). The testimony also showed that the season was an unusually dry one (Testimony of W. H. WRIGHT, Record, p. 24; C. F. MARTIN, Record, p. 46). The testimony shows that on November 14th, 1887, about 4:30 P. M., the cotton was set on fire (probably by accident), by some boys who were smoking or lighting cigarettes as they were going along the gangway between the bales of cotton (Testimony of THOMAS BARBER, Record, pp. 82–84; SAM. PRYOR, Record, pp. 84–88; PETER COBB, Rec-

ord, pp. 88–89). There was also evidence which tended to show that none of the defendant's trains or engines had passed along the track near the Compress Company's warehouse for three hours prior to the fire, and that the fire was not set or created by reason of any spark or negligence in that regard on the part of the Railway Company or of its employees (Testimony of 10 or 15 witnesses, Record, p. 80). The fire spread and consumed all the cotton stored in the street and in the sheds, including the cotton of Sam. O. Smith & Co., on account of which this action is brought (Testimony of SAM. O. SMITH, Record, p. 17). The 340 bales of cotton of Sam. O. Smith & Co. were, at the time of the fire, insured by plaintiff insurance companies for $17,000 (Testimony of SAM. O. SMITH, Record, p. 16 ; Insurance Policies, Record, pp. 13 to 15). The value of the cotton was over $18,000 (Testimony of SAM. O. SMITH, Record, p. 16). The Insurance Companies paid Sam. O. Smith & Co. the full amount due under the policies (Testimony of SAM. O. SMITH, Record, p. 16). The Railway Company, for the season of 1887, fixed a rate to the Compress Company for carrying cotton from Little Rock to Argenta for all the cotton which it might carry. This rate was not fixed by contract, but was merely announced orally by the agents of the Railway Company to the agents of the Compress Company (Testimony of A. P. HOWELL, Record, p. 30). There was also an agreement as to taking out insurance upon cotton, also as to payment for compression (Testimony of A. P. HOWELL, Record, p. 68). Aside from this, there was no agreement of any kind with the Compress Company as to carrying the cotton between Little Rock and Argenta (Testimony of A. P. HOWELL, Record, pp. 31, 67, 70).

The evidence also showed that the plaintiff insurance companies, which were foreign corporations, had not complied with the Arkansas statute by filing a certificate in the office of the Secretary of State, designating an agent upon whom process might be served, and stating the principal place of business of such company in that State, in accordance with the Act of April 4th, 1887 (Testimony of J. H. SHINN, Record, pp. 109–110). It was admitted that the plaintiff insurance companies were "doing business" in the State of Arkansas (Record, p. 110).

The Court, upon the evidence as above stated, refused to give the fourteen separate instructions requested by the defendant (Record, pp. 116–119), and of its own motion gave certain other instructions (Record, pp. 120–121). The defendant excepted to the rulings of the Court in both of these respects, and made its exceptions a part of this Bill of Exceptions (Record, p. 121).

The Court also admitted certain evidence against the objections of the defendant, and its rulings on these points were duly excepted to by the defendant, and these exceptions form part of this Bill of Exceptions (Record, pp. 19–20, 59–65, 66–67).

The defendant offered to read in evidence a petition to the Board of Councilmen of the City of Little Rock by the Little Rock Oil and Compress Company for a lease of that part of Main street where the cotton in question was stored; also a contract and lease executed by the City of Little Rock to that company in compliance with the said petition; also an assignment of

the said contract and lease to the Union Compress Company. The Court excluded the evidence thus offered, to which ruling the defendant excepted, and made its exceptions a part of this Bill of Exceptions (Record, pp. 113–115).

Assignment of Errors.

1st. The Court erred in overruling defendant's motion to compel plaintiffs to make their complaint more specific and to file their policies of insurance as exhibits to their complaint.

2d. The Court erred in overruling defendant's plea of non-joinder filed herein.

3d. The Court erred in overruling the demurrer filed by defendant to each of the paragraphs of plaintiffs' complaint herein.

4th. The Court erred in permitting, over defendant's objection, the testimony of H. G. Vanetten, C. E. Fergusen, L. W. Coy, and J. H. Trump, to go to the jury, wherein it was attempted to show that there had been a shortage of cars on defendant's road during the years 1886 and 1887, prior to the fire, and that consequently caused delay in the shipment of lumber over defendant's road when offered by the lumber mills in the State of Arkansas during those years.

5th. The Court erred in permitting plaintiffs, over defendant's objection, to read to the jury the ordinance of the City of Little Rock—No. of section, 596—forbidding all persons from encumbering or obstructing any street, alley, or public place in the City of Little Rock.

6th. The Court erred in permitting plaintiffs, over defendant's objection, to read to the jury the proclamation of the Mayor of the City of Little Rock, ordering all persons within the corporate limits to remove all bales of cotton from the streets and alleys in said city and from storing their cotton or property therein.

7th. The Court erred in permitting the plaintiffs, over defendant's objection, to read to the jury a release executed by G. W. Martin and others to the defendant railway company, releasing said railway company from liability for the value of said cotton burned in excess of

the amount paid by the plaintiffs, said receipt having been given during the progress of the trial and upon consideration paid by plaintiffs.

8th. The Court erred in refusing to permit the defendant to read in evidence a written petition from the Little Rock Oil and Compress Company to the City of Little Rock, Ark., and a lease executed by the City of Little Rock to the Little Rock Oil and Compress Company and by said company assigned and transferred to the Union Compress Company, wherein the said city leased for a term of years all that part north of Main street lying between its warehouses near and adjacent to defendant's railway tracks.

9th. The Court erred in refusing to permit defendant to prove that at the time of the fire the Union Compress Company held, occupied, and used North Main street under and by authority of a written lease made and executed to it and its assignors, in writing, by the City Council of the City of Little Rock.

10th. The Court erred in refusing to give the first instruction asked for by the defendant.

11th. The Court erred in refusing to give the second instruction asked for by the defendant.

12th. The Court erred in refusing to give the third instruction asked for by the defendant.

13th. The Court erred in refusing to give the fourth instruction asked for by the defendant.

14th. The Court erred in refusing to give the fifth instruction asked for by the defendant.

15th. The Court erred in refusing to give the sixth instruction asked for by the defendant.

16th. The Court erred in refusing to give the seventh instruction asked for by the defendant.

17th. The Court erred in refusing to give the eighth instruction asked for by the defendant.

18th. The Court erred in refusing to give the ninth instruction asked for by the defendant.

19th. The Court erred in refusing to give the tenth instruction asked for by the defendant.

20th. The Court erred in refusing to give the eleventh instruction asked for by the defendant.

21st. The Court erred in refusing to give the twelfth instruction asked for by the defendant.

22d. The Court erred in refusing to give the thirteenth instruction asked for by the defendant.

23d. The Court erred in refusing to give the fourteenth instruction asked for by the defendant.

24th. The Court erred in giving its charge to the jury as set out in paragraph numbered (1) of said charge, and especially in giving that portion of the charge specifically set out in the bill of exceptions on page 121 of the Record.

25th. The Court erred in giving in its charge to the jury the second paragraph of said charge, which is specifically set out in the bill of exceptions.

26th. The Court erred in giving to the jury the third paragraph of its charge, as set out specifically in the bill of exceptions, and to which exceptions were properly taken at the time and duly allowed.

27th. The Court erred in taking the case at the time from the jury and finding the facts therein, thus virtually rendering a verdict without the aid of the jury.

Wherefore, the defendant prays that the judgment rendered in this cause be reversed, set aside, and held for naught, and that the Circuit Court be directed to dismiss the complaint, or that a new trial be had, as to this Court shall seem proper.

ARGUMENT.

I.

If there was on the facts of this case any liability on the part of the Railway Company (which we deny), the plaintiff insurance companies cannot maintain this action IN THEIR OWN NAMES. Whatever rights they have acquired against the Railway Company have been acquired by the issuing of the policies, their payment of losses to, and subrogation to the rights of, the insured; and if there was any cause of action, it can be asserted in an action at law ONLY IN THE NAME OF THE INSURED.

The objection here made appears upon the face of the complaint, and was properly raised in the Court below by a demurrer, on the grounds: (1) that there was a defect of parties plaintiff in that the insured under whom the plaintiffs claim their right were not made parties, and (2) that the facts stated in the complaint did not constitute a cause of action in favor of plaintiffs (Record, pp. 6, 12–13). There was also a plea of non-joinder of the insured, Sam. O. Smith & Co., (*Ib*). Both the demurrer and the plea were overruled by the Court, to which rulings the defendant duly took exceptions, which it has made part of this Bill of Exceptions (*Ib*). Neither by the practice of this Court nor by the Arkansas Code was this error waived by the defendants answering over; and the error can be reviewed by this Court on this writ of error to reverse the judgment entered on the verdict.

Teal vs. Walker, 111 U. S., 242, 246.
Mansfield's Digest Arkansas Statutes, § 5031.

This point was also raised by the instructions which the Court gave, to which instructions the defendant excepted at the time, and has made its exceptions a part of this Bill of Exceptions (Record, pp. 120–121). In these instructions the Court charged the jury that in the event they found certain facts therein mentioned, then the plaintiffs were entitled to recover. It was error to charge that the plaintiffs could recover at all in this action which is brought in their own names.

The theory on which plaintiffs seek to maintain this action is, that the fire was caused by the negligence of

the Railway Company, causing loss and damage to Smith & Co., the owners of the cotton, and that the plaintiffs, having paid the said Smith & Co. the amounts due under policies issued by them on said cotton, became thereby subrogated to the alleged right of the insured, as the owners of the cotton, to recover damages from the Railway Company for its negligence causing the loss. Assume that all these propositions are true, still the plaintiff insurance companies cannot recover in this action, for the reason that *the action is not brought in the name of the insured.*

The action is one of *tort*, and is an *action at law.* The alleged cause of action is an injury to the property of the insured caused by the negligence of the Railway Company. The case raises no question of common carrier's liability, or even of warehouseman's liability. The fact is undisputed that the Railway Company had not issued bills of lading for, neither did it at any time have possession or control of the cotton in question either as a common carrier or warehouseman or otherwise. The action is therefore an action of tort and at law. It is elementary law that in the absence of a statute to the contrary such an action must be brought in the name of the person whose property is injured, and an action cannot be maintained in the name of his assignee or in the name of the person entitled by right of subrogation.

The authorities uniformly support the proposition above stated. The leading case, on all fours with the present one on this point, is *London Assurance Company vs. Sainsbury,* 3 Dougl., 245. The facts were as follows: A fire in London had been caused by rioters. By statute the "inhabitants of London" were liable

for damage caused by acts of rioters. The insured recovered from the insurer the amount due under the policy. The *insurer* then brought this action *in its own name* against the inhabitants of London to recover from them for the damage done by the rioters to the property on which it had paid the insurance money. The Court held that the insurer could not maintain the suit in its own name, but must sue, if at all, in the name of the insured.

During the argument, counsel for the defendants was about to yield the point, saying (p. 247):

"No objection will be made that the action is brought in the name of the *insurer*, because that question appears to be decided in *Mason vs. Stainsbury*, 3 Dougl., 61" (a suit in name of *insured* against the inhabitants on account of the same fire).

Whereupon, interrupting counsel, "BULLER, J., said he did not understand that point to be concluded by anything that passed in this Court; and Lord MANSFIELD said that *the great question was, whether the insurer could recover otherwise than in the name of the insured.*"

Lord MANSFIELD then directed that this question stand over for argument. The decision was that the *insurer could not recover in its own name.* An appeal was taken to the Exchequer Chamber, and the decision unanimously affirmed.

Lord MANSFIELD, giving his opinion, said (p. 253):

"I agree that the plea and replication are immaterial, and that the question is, whether this action could have been maintained *in the name of the plaintiffs* against the *rioters* if the statute had never been made. Langdale is the sole owner. The relation of the plaintiffs is by the insurance, which is a contract of indemnity. It follows that in respect of salvage the insurer

stands in the place of the insured, and *vice versâ* as to damage. I take it to be a maxim that, as against the person sued, the action cannot be transferred. As between the parties themselves the law has long supported it for the benefit of commerce; *but the assignee must sue in the name of the assignor;* by which the defense is not varied. *There is no instance of an action in the name of an insurer,* while numberless actions have been brought by owners of ships for damage done by other ships, where many of them must have been insured. * * * As we are equally divided, in order to expedite the bringing of a writ of error, let there be judgment for the defendant."

This decision is the law everywhere to-day except as changed by statute; and in Arkansas, as we shall show, *infra,* (p. 27), the statutes have not changed it.

In *Simpson vs. Thomson,* 1 L. R., 3 App. Cas., 279, the facts were as follows: Two ships, the property of the same owner, collided; the underwriters paid the insurance effected on the lost ship, and then claimed to rank *pari passu* with the owners of cargo destroyed, in the distribution of the fund lodged in Court (as required by statute) by the owner as proprietor of the ship which did the damage. The House of Lords held that the underwriters had no such right. In the course of his opinion the Lord Chancellor (CAIRNS) said (p. 284):

"I know of no foundation for the right of underwriters, except the well-known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself for the loss. It is on this principle that the underwriters of a ship

that has been lost are entitled to the ship in specie if they can find and recover it; and it is on the same principle that they can assert any right which the owner of the ship might have asserted against a wrong-doer for damage for the act which has caused the loss. *But this right of action for damages they must assert, not in their own names, but in the name of the person insured,* and if the person insured be the person who has caused the damage, I am unable to see how the right can be asserted at all."

Lord PENZANCE, also, in his opinion, said (p. 290):

"But the ground upon which I will ask your Lordships to reject this contention of the respondent's counsel is this, that upon the cases cited *no precedent or authority has been found or produced to the House for an action against the wrong doer except in the name, and, therefore, in point of law, on the part of one who had either some property in, or possession of, the chattel injured.*"

The proposition (I.) above stated is the law in this court. In *Hall vs. Railroad Companies,* 13 Wall. 367, the facts were these: The goods insured were accidentally destroyed by fire while being transported by the railroad companies; the insurance companies paid the amount due under their policies to the insured; and afterwards the insurance companies brought this action *in the names of the insured* to recover from the railroad companies on their common-carrier liability to the insured. The Circuit Court decided that the action could not be maintained. But this Court reversed that decision. Mr. Justice STRONG, giving the opinion of the Court, among other things, said (p. 372):

"There is also a large class of cases in which attempts have been made by insurers who had paid a loss to recover from the party in fault for it, *by suit in their own right and not in the right of the assured. Such*

attempts have failed, but in all cases it has been conceded that suits might have been maintained *in the name of the insured party*, for the use of the insurers. And such is the English doctrine settled at an early period " (citing cases).

Also (p. 373):

" There is nothing, then, to take the case in hand out of the GENERAL RULE that an underwriter, who has paid a loss, is entitled to recover what he has paid by a suit *in the name of the assured* against a carrier who caused the loss."

In *Phœnix Insurance Co. vs. Erie Transportation Co.*, 117 U. S., 312, Mr. Justice GRAY, giving the opinion of the Court, says (p. 321):

" From the very nature of the contract of insurance as a contract of indemnity, the insurer, when he has paid to the assured the amount of indemnity agreed on between them, is entitled, by way of salvage, to the benefit of anything that may be received, either from the remnants of the goods or from damages paid by third persons for the same loss. But the insurer stands in no relation of contract or of privity with such persons. His title arises out of the contract of insurance, and is derived from the assured alone, and can only be enforced in the right of the latter. *In a court of common law it can only be asserted in his name*, and even in a court of equity or of admiralty, it can only be asserted in his right. In any form of remedy the insurer can take nothing by subrogation but the rights of the assured."

The law is the same everywhere, unless changed by statute.

Rockingham Mutual Fire Ins. Co. v. Bosher, 39 Maine, 253, was an action of trespass on the case. The plaintiff insured one Shannon in a certain sum upon his store or shop and goods therein, which were burned

during the life of the policy. The loss was adjusted and paid, and this action was brought to recover the amount so paid of the defendant, who was alleged to have wilfully and maliciously set fire to the building.

A general demurrer was filed to the declaration. The parties agreed to submit the question whether the action could be maintained *in the name of the company.* It was held that it could not be so maintained. Referring to the case of *The London Assurance Company vs. Sainsbury, supra*, the Court says:

"This case has not been overruled by any cited for the plaintiffs, or which we have been able to find, and the reason of the doctrine of the cases, in which it was held that an action may be maintained *in the name of the owner*, as the trustee of the insurer, who has paid the loss, against the wrongdoer or party first liable as principal, is wholly inconsistent with the principle that the insurer can in his own name recover for money paid on the contract of insurance in an action against the wrongdoer. For the insurer and assured being in effect one person, each cannot maintain an action at the same time and for the same loss, where there can be but one satisfaction."

Peoria Ins. Co. v. Frost, 37 Ill., 334, was an action *in the name of the insurer* against third persons to recover damages for their negligence by reason of which the property insured had been destroyed by fire. The Court held that the action could not be maintained in the name of the insurer.

Mr. Justice LAWRENCE, giving the opinion of the Court, said (p. 335):

It is admitted that if there was such carelessness they (the third persons) were liable, and *the only question made upon this record is, whether this liability can be enforced in the name of the present plaintiff*, or

whether the suit must be brought in the name of the owners of the property destroyed, for the use of the insurance company."

After citing and commenting upon the leading cases, Mr. Justice LAWRENCE continues (p. 336):

" In the face of this formidable array of authorities we are urged in the very elaborate argument of the counsel for the plaintiffs in error to establish for this State a new rule. * * * The rules of procedure at common law are the results of centuries of experience applied to human affairs by intellects at once comprehensive and acute, and where we find a principle firmly established by a series of decisions beginning with such names as MANSFIELD and BULLER, and followed by such courts as we have quoted, *with not a single adverse decision to break the current of authorities*, we should hesitate long before we pronounce the rule arbitrary and unreasonable, and, therefore, unworthy to be followed. If courts were to assume the right to overturn an established rule whenever, if the question were a new one, they might be inclined to hold a different principle, the law would cease to be a system and degenerate into a mere matter of judicial discretion. The profession would be unable to advise their clients, and the reproach of uncertainty which it is so common to cast upon the administration of justice would be well deserved.

The decisions we have quoted proceed upon the ground that when an injury is done to property the remedy must be sought in the courts at common law by some person who has an estate in the property, legal or equitable, which the law recognizes. But the insurance company had no estate or ownership in this property of any kind whatever."

Mr. Flanders states the rule concisely and accurately as follows :

" Where insured property has been burned by the careless or wilful act of third persons, the insurers, upon paying the loss, become subrogated to the rights of the assured, and may sue the wrongdoers, *not in their*

own name, but in the name of the owner of the property."

Flanders on Insurance, 2d Ed., p. 648.

See also

Commercial Union Ins. Co. vs. Lister, L. R., 9 Ch. Ap., 483.

Darrell vs. Tibbitts, L. R., 5 Q. B. D., 560, 561.

Conn. Life Ins. Co. vs. N. Y. & H. R. R. Co., 25 Conn., 265.

Hart vs. Western R. R. Co., 13 Met., 101.

In a court of equity or a court of admiralty the insurer may, if there is any cause of action, bring his suit *in his own name.*

Liverpool Steam. Co. vs. Phœnix Ins. Co., 129 U. S., 397, 462.

Phœnix Ins. Co. vs. Erie Trans. Co., 117 U. S., 312, 321.

But in those courts, as well as at common law, he can recover only in the *right* of the insured.

Phœnix Ins. Co. vs. Erie Trans. Co., *supra.*

Platt vs. Richmond, &c., R. R. Co., 108 N. Y., 358.

Simpson v. Thomson, L. R., 3 App. Cas., 279.

There is nothing in the Arkansas Statutes changing the rule of common law that an action like the present one must be brought in the name of the insured.

The statutes provide:

"Every action must be prosecuted in the name of the real party in interest, except as provided in Sections 4935, 4936 and 4938."

Mansfield's Digest, § 4933.

Sections 4935, 4936 and 4938 do not cover the case now in question. But the statutes also provide in the next section:

"Where the assignment of a thing in action *is not authorized by statute*, the assignor must be a party as plaintiff or defendant."

Mansfield's Digest, § 4934.

Under this section the test is, whether the thing which is the subject of the suit is made assignable by statute. If it is not made assignable, then the person in whose favor the right of action originally exists must be made a party to the suit. Now, the thing in action in the present case arises from a *tort*, and the assignment of it "is not authorized by statute." The following section states what things are assignable:

"All bonds, bills, notes, agreements and contracts, in writing, for the payment of money or property, or for both money and property, shall be assignable."

Mansfield's Digest, § 473.

A right of action for a *tort* is clearly not embraced among the things made assignable by the section last quoted; and nowhere in the Statutes of Arkansas is such a right of action made assignable. See on this point:

St. Louis, Iron Mountain and Southern Railway Co. vs. Bank of Camden, 47 Ark., 548.

Oliver vs. Walsh, 6 Cal., 456.

Hicks vs. Doty, 4 Bush (Ky.), 420.

The statutory provisions in California and Kentucky under which the above cases were decided were substantially like those of Arkansas which apply in the

present case; and the courts of both those States, as well as the Arkansas Court in the case cited, reach conclusions which fully support the propositions here stated.

In those States where the Codes require or permit *all* actions to be brought in the name of the real party in interest (*with no exceptions*) it has been decided with doubtful correctness, and apparently without much consideration, that the insurer may sue in his own name.

Conn. Fire Ins. Co. vs. Erie Ry. Co., 73 N. Y., 399, 405.
Swarthout vs. Chicago and N. W. R. R. Co., 40 Wis., 625.

But, however this may be, the Codes of those States contain no such provision as is contained in Section 4934 of the Arkansas Statutes, above quoted. Even if, therefore, these two cases were well decided under the Codes of New York and Wisconsin, they furnish no support for the ruling of the Circuit Court in the present case.

It was said by the Court below that the above statute, which provides that:

"§ 4934. Where the assignment of a thing in action is not authorized by statute, the assignor must be a party, as plaintiff or defendant"——

has no application in the present case. The reason

which the Court gave was, that the insurer, in a case like the present one, does not sue as assignee.*

This proposition proceeds from the failure to apprehend the common law rule above stated—that the insurer must sue, if at all, in the name of the insured—and the reasons for this rule. The very foundation and reason of the rule is, that the right to sue for a tort is a chose in action and is *not assignable.* In other words, the insurer in such a case as the present attempts to sue in the character of an *assignee* of a chose in action; and it is because he attempts to sue as *assignee of a chose in action* that he is not allowed to sue in his own name, but must sue, if at all, in the name of the assignor. This is the reason which is given by the Court in the case which established the rule on this subject, and which has ever since been followed and regarded as the leading authority.

In the leading case of *London Assurance Company vs. Sainsbury*, 3 Dougl., 245, *supra*, Lord MANSFIELD said (p. 253):

"I take it to be a maxim that, as against the person sued, *the action cannot be transferred.* As between the parties themselves the law has long supported it for the benefit of commerce; *but the assignee must sue in the name of the assignor;* by which the defense is not varied. There is no instance of an action in the name of an insurer."

There can be no doubt that if the person whose property is injured by a tort makes an *express written assignment* of the right of action for the tort, still, under the

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*See the opinion of the Circuit Court in a case which arose from the same fire, but in which the parties and facts were only partially the same: *Marine Ins. Co. vs. St. L., I. M. & S. Ry. Co.*, 41 Fed. Rep., 643, 644.

Arkansas Code, the assignee cannot sue in his own name, but must sue, if at all, in the name of the assignor, the person whose property is injured; for the right of action for a tort is not assignable under the statute of Arkansas. *A fortiori*, if the assignment of the alleged right of action for a tort is one *implied* from the contracts and acts of the parties, the assignee cannot sue in his own name, but must sue, if at all, in the name of his assignor. The assignee of a right of action for a tort can surely have no greater rights under an *implied* assignment than under an *express* one.

That the Circuit Court misapprehended the law, and the reasons therefor, is clear from the following remarks in its opinion in the somewhat similar case already referred to: *Marine Ins. Co. vs. St. L., I. M. & S. Ry. Co.*, 41 Fed Rep., 643. The Circuit Court there says (p. 645):

"The right of subrogation is sometimes spoken of as an 'equitable assignment,' but that is only a convenient figure of speech. From the time of the insurance the insurer has a pecuniary interest in the thing insured, and he becomes entitled to a legal remedy whenever he suffers a loss by reason of that interest, and it appears that the loss has been occasioned by the wrongful act of another. Of course, he has no right of action until he has paid the loss to the insured; because until that time he has suffered no damage."

This is not true; the insurer never has any pecuniary interest in the thing insured, either before or after the payment of a loss under the policy. This is perfectly well settled law, and is clear from the following cases, above cited, and the principles therein decided:

Phœnix Ins. Co. vs. Erie Transportation Co., 117 U. S., 312.

Platt vs. Railroad Co., 108 N. Y., 358.
Simpson vs. Thomson, L. R., 3 App. Cases, 279.

These cases all hold that the insurer has himself no right in the thing, but can sue only in the character of assignee and in the right of the insured; and if the insured has no right of recovery the insurer can have none. The case of *Simpson vs. Thomson* is stated at length, *supra*, p. 22. If in that case the insurer had had any right in the insured ship itself, then he would have had a right to rank *pari passu* with the owners of the cargo destroyed in the distribution of the fund lodged in Court. It was for the reason that the insurer had no such right in the ship itself that he was not allowed to rank with the owners of the cargo destroyed.

In *Phœnix Ins. Co. vs. Erie Transportation Co.*, and in *Platt vs. Railroad Co.*, *supra*, the carrier had stipulated with the owner that in case of loss the carrier should have the benefit of any insurance; and in both cases it was held that the carrier was not liable to the insurer, the reason being that the insurer had himself no right in the thing insured, but must work out his rights, if any, through the insured; and, as the insured had parted with his right to the carrier (to the amount of the insurance), therefore the insurer had no right to recover at all.

In *Phœnix Ins. Co. vs. Erie Transportation Co.*, 117 U. S., 312, Mr. Justice GRAY says on this point (p. 321):

"But the insurer stands in no relation of contract

or of privity with such person. His title arises out of the contract of insurance, and *is derived from the assured alone, and can only be enforced in the right of the latter.*"

In direct conflict with this is the statement and view of the Circuit Court (*Marine Ins. Co. vs. Ry. Co.*, 41 Fed. Rep., 645, bottom) that

"The plaintiff is suing in his own right, and not as assignee of the insured," &c.

The right of the insured is frequently called a right of subrogation. It matters not what it be called; it is in reality and effect an *assignment*. It is an assignment made by the acts of the parties in making the contract of insurance and in paying and receiving the amount of the loss due under the insurance. The law says these acts assign or transfer (in equity) the right of action to the insured.

A somewhat similar assignment takes place when the creditor assigns the debt but does not expressly assign the security which he holds for the debt. No one ever doubted that if a holder of a promissory note (or bond) secured by mortgage assigns the note (or bond) he also assigns the mortgage, and the assignee of the note holds the mortgage by *assignment*. It is true he is an assignee in equity only, but his character is none the less that of an assignee, and if he sues he sues as assignee.

Though the right of the insurer is commonly called a right of subrogation, yet it is not strictly a right of subrogation, but a right which he acquires by an equitable assignment. Subrogation assumes that the debt or obligation is *extinguished*, while assignment assumes that the debt or obligation is still *alive*.

In the case of insurance, the obligation of the third party to the owner is not extinguished by the payment of the insurance money by the insurer. This obligation continues to exist after the payment of the insurance money, and the insurer succeeds to the benefit of this obligation by the equitable assignment effected by the contract of insurance and payment thereunder.

In regard to the character in which an insurer takes his right in such a case as the present one Mr. SHELDON says (§ 6, p. 6):

"Subrogation to the rights of a creditor is to be distinguished from an assignment of the debt, by the fact that the latter assumes the continued existence of the debt while the former follows only upon its payment. Before the right of subrogation accrues there must be a discharge of the legal obligation resting upon the party ultimately liable. But the subrogation of an insurer to the remedies of the insured for the destruction of the insured property proceeds rather upon an implied assignment than upon a satisfaction of the cause of action; at any rate in cases of insurance against loss by fire. And the party for whose benefit the doctrine of subrogation is exercised can acquire no greater rights than those of the party for whom he is substituted; if the latter had not a right of recovery, the former can acquire none."

That the plaintiffs, in attempting to sue, are doing so as *assignees* is evident, also, from the construction which has uniformly been put upon that section of the Federal Judiciary Act, which provides that

"No Circuit Court shall have cognizance of any suit to recover the contents of any promissory note or other *chose in action* in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange."

Rev. Stat., § 629.

As to what is an "assignment," or who is an "assignee," it has uniformly been decided that a person who claimed under an equitable assignment was an assignee within the terms of the act, and could not sue in the Federal Courts unless his assignor could sue there.

Shoecraft vs. Bloxham, 124 U. S., 731, is a case in point. In that case a deed of trust, in the nature of a mortgage, set out in full a contract between the mortgagor and certain parties for the conveyance of several parcels of land to him, and then conveyed to the mortgagee all the right, title, and interest which he, the mortgagor, had, or might thereafter acquire, in and to the lands embraced by the contract. The suit was brought to enforce specific performance of the contract referred to in this conveyance. Note that the conveyance assigned the land, but did not expressly or in terms assign the contract therein mentioned. The Court held that the grantee was nevertheless the person beneficially interested in the contract, and that as to such interest he was an "*assignee*" within the meaning of the Judiciary Act; and hence, as his assignor could not sue in the Federal Court, he, the assignee, could not do so.

Mr. Justice FIELD, giving the opinion of the Court, said (p. 735):

"It is contended, however, that the complainant is not the assignee of the contract of May 31, 1871, but a mortgagee in trust of the lands mentioned therein, and can therefore maintain the suit by reason of his citizenship in New York. We cannot assent to this position. It is true the complainant is a mortgagee in trust of such interest as the mortgagor had in the lands, but he brings the suit, not to foreclose the mortgage, but as one having a beneficial interest in the contract, and conse-

quently a right to enforce it. The object of the suit is to perfect the title to the lands mortgaged by enforcing the performance of the contract. The deed of trust sets out in full the contract, and conveys all the right, title and interest which the Railroad Company had or might thereafter acquire in and to the lands granted by the trustees by their contract of May 31, 1871. This conveyance of all right, title and interest "in and to" the lands granted, or agreed to be granted, by the contract of sale, carried with it to the complainant an interest in the contract so far as such lands were concerned, that is, the right to perfect the title to the lands by the enforcement of the contract. It was in legal effect the assignment of the contract itself. If he cannot enforce that contract and thus secure the title to the company, the deed of trust, so far as the lands covered by the contract are concerned, it is worthless as a security. If he has no interest in the contract, he has no standing in Court to ask its enforcement, and, if he is to be regarded as an assignee of the contract under the deed of trust, he is disabled from maintaining the suit in the Circuit Court by § 629 of the Revised Statutes. He is subject to the same disability in that respect as his assignor."

The case of *Deshler vs. Dodge*, 16 How., 622, was cited by the Circuit Court (Opinion in *Marine Ins. Co. vs. Ry. Co.*, 41 Fed. Rep., 643, 645), as holding that, where the plaintiff brought replevin for bills that had been assigned to him, he was not suing in the character of assignee. But that case shows the exact contrary. The Court held that the plaintiff in that case was suing as assignee. This is perfectly clear from the following language (p. 631):

"It is admitted the *assignors* in this case could not have maintained the suit in the Federal Courts. We are of opinion that this clause of the statute has no application to the case of a suit by the *assignee* of a chose in action to recover possession of the thing in specie, or damages for its wrongful caption or detention; and that it applies only to cases in which the suit is

brought to recover the contents, or to enforce the contract contained in the instrument assigned."

What the Court did hold, as is shown by the above extract was: (1) that it was a suit by an assignee; and (2) that it was not a suit to recover the "*contents*," and therefore not within the terms of the statute.

Bushnell vs. Kennedy, 9 Wall., 387, is also cited by the Circuit Court (*Marine Ins. Co. vs. Ry. Co.*, 41 Fed. Rep., 643) for the following proposition (p. 645):

"So it has been held that, when a note is made payable to bearer, a transferee thereof does not hold by assignment, and that an executor holding under a will of his testator does not hold as assignee."

What the Court said in *Bushnell vs. Kennedy*, was as follows (p. 391):

"It has been held that suits upon notes payable to a particular individual, or to bearer, may be maintained by the holder, *without any allegation of citizenship of the original payee; though it is not to be doubted that the holders' title to the note could only be derived by assignment.* So, too, it has been decided, where the assignment was by will, that the restriction was not applicable to the representative of the decedent."

In all these cases it is clear that the holder takes by assignment, and the Court so states; but for special reasons, which relate to the interpretation of the Judiciary Act, but which do not concern the present case—such as, for example, that the suit is not brought to recover "the contents," as specified in the Judiciary Act—that for such special reasons the act does not apply.

As stated above, the very reason and foundation of the common law rule—that the insurer cannot sue in his own name, but must sue, if at all, in the name of the

insured—is that the insurer would be attempting to sue *as the assignee of a chose in action*, which the common law does not allow. This is the reason given by Lord MANSFIELD in *London Assurance Co. vs. Sainsbury*, *supra*, and the reason given by courts everywhere from the time of Lord MANSFIELD to the present day.

The Circuit Court (*Marine Ins. Co. vs. Railway Co.*, 41 Fed. Rep., 643, 645, bottom), entirely misstates the point in *Railroad Co. vs. Dows*, 120 U. S., 287. That case has no direct bearing upon the point now under consideration. So far, however, as that case goes, it is an authority, not in favor of the plaintiffs below, but in favor of the Railway Company. In the first place it is to be noted that that was a case of subrogation in the proper sense of the term, the debt in that case having been extinguished by payment; while the present case is not one of subrogation proper, but of assignment, the obligation, if any, of defendant Railway Company for the tort still continuing in existence after the payment by the Insurance Companies to the insured. But the case of the *Railroad Co. vs. Dows* does not decide what the Circuit Court said it did. The debt in question was a debt due to the State of Arkansas, and bore 8 per cent. interest (not 10, as stated by the Circuit Court). The State enforced its lien for this debt by suit, and obtained a decree for the amount of the principal of the debt, with interest on such principal at 8 per cent., the conventional rate, the decree declaring a lien and directing a sale of the property for this amount. In order to avoid having the property sold under that decree the mortgagee, whose lien was subsequent to the lien of the State for the debt above mentioned, paid the debt (principal and interest,

at 8 per cent.) to the State, and by reason of this payment became subrogated to the right of the State as to the whole amount paid, including the interest at 8 per cent., the conventional rate ; and acquired a lien on the property for that amount. When that lien of the subsequent mortgagee was enforced, the question arose as to what rate of interest should be allowed on the whole amount (including interest at 8 per cent.), so paid by the mortgagee to the State. As to *this* rate of interest there was no contract. The contract and debt had been extinguished by payment, as is always the case in subrogation proper. The only question was what would be a proper reimbursement for the amount so paid by the mortgagee, and the Court rightly held that the proper reimbursement would be the total amount paid (including the principal and interest at the conventional rate of 8 per cent.), plus the ordinary legal rate of interest at six per cent. on such total amount.

There is, also, another insuperable objection to allowing suits like the present one to be brought in the name of the insurer. *The tort, if any, is one and indivisible ; it is committed against only one person, namely, the owner of the property ; and it gives rise to but one liability, and that is to the owner.* If there are several insurers on the same property and one insurer may bring suit in his own name, another insurer may bring a suit also, and another, and still another, may do the same ; and if the value of the property exceeds the total amount of the insurance (as was the fact in the present case), then the owner of the property may bring

still another suit for the excess. A *tort*, which in its nature is single and indivisible, would thus be made to give rise to an indefinite number of actions, and lead to excessive and useless litigation, contrary to justice and the policy of the law. This has always been deemed, and in our judgment is, a sufficient reason why such actions should not be allowed; and so it has been uniformly held.

A case in point is *Ætna Insurance Co. vs. Railroad Company*, 3 Dillon, 1. In that case the action was brought in the name of the Insurance Company. The petition alleged that the plaintiff insured certain property which, within the lifetime of the policy, was destroyed by fire caused by the negligence of the defendant's servants; that the plaintiff had paid the owner of the property a certain amount in satisfaction of the policy, and that the owner of the property had, by written instrument, assigned to the Insurance Company all his right to recover damages against the defendant on account of the destruction of the property, reserving to himself, however, the right to recover all damages in excess of the said amount paid to him by the plaintiffs.

The defendant demurred to the petition on the ground that the cause of action was not assignable and because the plaintiff was not entitled to maintain an action in its own name, and the Court, on these grounds, sustained the demurrer.

The Court, giving its opinion, said:

"The property destroyed exceeded in value the amount insured, and the rule of law has been long settled that the insurance company, on the payment of the loss, cannot sue the wrongdoer who occasioned it in its own name. The suit, though for the use of the insurer, must be in the name of the person whose property was

destroyed. *The wrongful act was single and indivisible, and gives rise to but one liability. If one insurer may sue, then if there are a dozen, each may sue, and if the aggregate amount of all the policies falls short of the actual loss, the owner could sue for the balance.* This is not permitted, and so it was held nearly a hundred years ago in a case whose authority has been recognized ever since, both in Great Britain and this country (*London Assurance Co. vs. Sainsbury*, 3 Doug., 245 (1783), in which the Exchequer Chamber unanimously affirmed the judgment of the King's Bench for the defendant; *Rockingham, etc., Ins. Co. vs. Bosher*, 39 Maine, 253, and cases cited; *Hart vs. Western Railroad Corporation*, 13 Metc., 99, where the subject is fully gone into by Chief-Justice SHAW; *Conn., etc., Ins. Co. vs. N. Y., etc., R. R. Co.*, 25 Conn., 265, 278; *Peoria, etc., Ins. Co. vs. Frost*, 37 Ill., 333; Flanders on Insurance, pp. 360, 481, 591). But it is insisted that the provision of the Missouri statute, that every action shall be prosecuted in the name of the *real party in interest*, though it declares that the provision shall not authorize the assignment of a thing in action not arising out of contract (Gen. Stats. 1865, p. 651, Sec. 2), changes the rule. However it might be if the amount paid by the insurer to the assured had equaled or exceeded the value of the property, and the assured had made a full assignment, it is plain that this case falls within all the reasons of the rule itself, as expounded by BULLER and MANSFIELD in the case in Douglas above cited, and which is the foundation of the law on this subject. The demurrer to the petition is sustained.

See also to the same effect, per BULLER, J., in *London Assurance Co. vs. Sainsbury*, also *Peoria Ins. Co. vs. Frost*, above cited.

The complaint should therefore have been dismissed on the ground above stated; and this Court should reverse the decision of the Circuit Court on this point, and give directions to dismiss the complaint.

II.

The plaintiff insurance companies cannot maintain this action for the reason that they have not complied with the laws of Arkansas as to the terms upon which foreign corporations are permitted to do business in that State, and the statute expressly renders their contracts void in such a case; and as the contracts or policies of insurance were illegal and void, no right of subrogation can arise therefrom.

THE STATUTE OF ARKANSAS is as follows:

"AN ACT *to prescribe the conditions upon which Foreign Corporations may do business in this State.*

"SECTION 1. Before any foreign corporation shall begin to carry on business in this State it shall, by its certificate under the hand of the president and seal of such company, filed in the office of the Secretary of State, designate an agent who shall be a citizen of this State, upon whom service, summons and other process may be made. Such certificate shall also state the principal place of business of such corporations in this State. Service upon such agent shall be sufficient to give jurisdiction over such corporation to any of the Courts of this State.

SEC. 2. If any such foreign corporation shall fail to comply with the provisions of the foregoing section, *all its contracts* with citizens of this State *shall be void as to the corporation*, and no Court of this State shall enforce the same in favor of the corporation."

Acts of Arkansas, 1887, p. 234.

This is a peculiar statute. Note its provisions. It

is founded upon public policy. The contract is not void as to the insured, but void as to the foreign corporation which contemns or disregards its provisions; and it is such corporations that in this action are seeking to recover solely on the ground that they had issued policies which compelled them to pay the loss to the insured. The statute says that these policies were "void as to the corporation."

The evidence showed that the plaintiff insurance companies had not complied with the above statute (Testimony of J. H. SHINN, Record, pp. 109-110). It was also admitted that all the companies involved in these suits were doing business in the State of Arkansas at the time of the issuance of the policies and at the time of the fire (Record, p. 110). These policies or contracts of insurance were made and issued at Little Rock, within the State of Arkansas, as the policies themselves show (Record, pp. 13–15).

Upon this evidence the defendant requested the Court to instruct the jury as follows (Record, p. 119):

"14th. If the jury find that the plaintiffs, at the time of the issuance of the policy of insurance introduced in evidence in this cause, had not and have never up to this date filed in the office of the Secretary of State certificates designating an agent upon whom service of summons and other process may be made, or certificate stating the principal place of business of each plaintiff in this State, as required by the statute of the State, it cannot maintain this action."

The Court refused to give said instruction, to which ruling the defendant duly excepted, and made its exceptions part of this bill of exceptions (Record, p. 119).

The Court, of its own motion, instructed the jury on this point as follows (Record, p. 121):

"The defendant has pleaded that the policies of insurance mentioned in the complaint were void because the plaintiffs had not complied with the laws of this State. Upon the evidence this defense is not sustained, and on that issue the jury will find for the plaintiff."

To this instruction the defendant excepted, and made its exception part of this bill of exceptions (Record, p. 121):

The Court erred in giving the instruction which it gave, and in not giving the one which it refused to give. It is well-settled law that though a foreign corporation may, in the absence of statute, do business in a State by virtue of the law of comity, yet any State may exclude a foreign corporation entirely, or may impose such terms and conditions as it may choose upon the admission of a foreign corporation to do business within its borders. This was decided in the well-known case of *Paul vs. Virginia*, 8 Wall., 168. The opinion in that case was by Mr. Justice FIELD. The following often-quoted extract states the law on this point (p. 181):

"The corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this Court in *Bank of Augusta vs. Earle*, 13 Peters, 586, '.it must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such

recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens, as in their judgment will best promote the public interest. The whole matter rests in their discretion."

The State of Arkansas has exercised this power of regulating the admission of foreign corporations to do business within its borders. It has declared its "policy" toward such corporations in the statutory enactment above quoted. The title of the Act is: "*An Act to prescribe the conditions upon which foreign corporations may do business in this State.*" The public policy of the State as expressed in the Act is, that all foreign corporations that do business within the State shall be suable in its Courts in the same manner as its domestic corporations are suable, in order that its own citizens may thus have convenient means of redress against such foreign corporations. For this purpose the Act provides for the designation of an agent of the foreign corporation upon whom process may be served (see Act quoted *supra*).

This is both reasonable and just. If a foreign corporation comes into a State to do business it should be amenable to the Courts of that State in respect to the business which it does therein. If the citizens of the State were obliged to go elsewhere to find such corporation for the purpose of suing it, the practical result would be, as was said by this Court in *Railroad Company vs. Harris*, 12 Wall., 65, 84:

"In many instances the cost of the remedy would

have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility."

Of a similar statute (which, however, did not expressly make the contracts of the foreign insurance company void) the Supreme Court of Massachusetts has said (HOAR, J.):

"The manifest object of the statute is to protect the citizens of this commonwealth against fraudulent or worthless contracts of insurance, made by dishonest, irresponsible or litigious corporations, not amenable to its laws or under the control of its Legislature, and to prohibit such contracts from being made by agents within the commonwealth, except under conditions which shall furnish the security to be derived from an annual return of the condition and business of the company, with the appointment of a known agent, whose powers shall be precisely defined, and upon whom process may be served."

Roche vs. Ladd, 1 Allen, 436, 440.

For the purpose of enforcing compliance with the requirements of the above Act, and in order to carry out the public policy therein declared, the Legislature of Arkansas has provided a *penal sanction* for the Act, as follows:

"SEC. 2. If any such foreign corporation shall fail to comply with the provisions of the foregoing section, *all its contracts with citizens of this State shall be void* AS TO THE CORPORATION *and no Court of this State shall enforce the same* IN FAVOR OF THE CORPORATION."

Acts of Arkansas, 1887, p. 234, quoted *supra*.

Note the appropriateness of the penalty: If the requirements of the Act are not complied with—if the foreign corporation will not render itself amenable to

the laws and courts of Arkansas—then all the contracts of such corporation with citizens of the State of Arkansas are "*void as to the corporation*, and no Court of this State shall enforce the same *in favor of the corporation*." This penalty is the means which the Legislature of Arkansas has expressly provided for the purpose of making the law respected; and the Courts are bound to enforce the law by imposing the penalty whenever the law is violated. To do otherwise would be to nullify the law.

By the statute above quoted the doing of business within the State of Arkansas by plaintiffs was illegal, and the policies of insurance made by the plaintiffs to Sam. O. Smith & Co. (Record, pp. 12, 13) *were absolutely void* as to the plaintiffs. Note, that the statute does not merely prohibit the doing of business until certain prescribed conditions are complied with, but it also renders any contracts made before those conditions are complied with absolutely void as to the corporations. Without the aid of these contracts of insurance, the plaintiffs have no case; for, without the contracts of insurance, there is no right of subrogation and no right of action in plaintiffs. The statute makes those contracts of insurance illegal and void as to the corporation. Plaintiffs' right of action is thus based upon illegal and void contracts as a necessary part of their case; and the rule of law is clear that in such a case they cannot maintain an action.

THE FOLLOWING AUTHORITIES illustrate the principles above stated, and show that, even though the statute

(unlike the statute in Arkansas) does not expressly make the contracts of a foreign corporation void in such a case as the present one, yet the doing of business within the State is illegal, and, therefore, the corporation cannot recover on any of its contracts or maintain an action on any alleged right arising therefrom. *A fortiori*, in the present case, where the statute expressly declares such contracts void, the corporation cannot maintain an action arising therefrom.

A case in point is *Assurance Company v. Rosenthal*, 55 Ill., 85. This was an action of assumpsit to recover the unpaid balance of a promissory note. The note was given to the insurance company for stock in that company and for a premium. The defendant pleaded that the insurance company was a foreign insurance corporation; and that it had not complied with the Statutes of the State of Illinois (where the transaction occurred), which provided, that it should not be lawful for any agent or agents of any foreign insurance company to do business in Illinois without first procuring a certificate of authority from the Auditor of the State. There was a demurrer to this plea, which was overruled by the lower Court, and the Supreme Court unanimously affirmed that decision.

Mr. Justice WALKER delivering the opinion of the Court, said (p. 91):

"The note was made and delivered, and the policy given and the contract consummated in this State, in defiance of a law which is so plain in terms that it can bear no construction, and which any one can understand, declaring all such contracts unlawful. It says it shall not be lawful for any such agent, directly or indirectly, to take risks, or transact any business of insurance in this State, until they comply with the terms prescribed in the act. To permit the company, when they admit

that they have disregarded all of these requirements to recover would be for the courts to disregard the clearly expressed will of the General Assembly, and to say what it has said shall be unlawful is and shall be lawful and binding. To enforce the payment of this note would be virtually to repeal a plain enactment of the Legislature.

"When the Legislature prohibits an act, or declares that it shall be unlawful to perform it, every rule of interpretation must say that the Legislature intended to interpose its power to prevent the act, and as one of the means of its prevention that the courts shall hold it void. This is as manifest as if the statute had declared that it should be void. To hold otherwise would be to give the person, or corporation, or individual, the same rights in enforcing prohibited contracts as the good citizen who respects and conforms to the law. To permit such contracts to be enforced, if not offering a premium to violate a law, it certainly withdraws a large portion of the fear that deters men from defying the law. To do so, places the person who violates the law on an equal footing with those who strictly observe its requirements. That this contract is absolutely void as to appellee we entertain no doubt."

Another case in point, decided by this Court, is *Brown v. Tarkington*, 3 Wall., 377. The suit was brought to recover the amount of four promissory notes. The defendants were stockholders in the Bank of Tekama, in the Territory of Nebraska. The notes were signed by its president. The other facts are stated in the report as follows (p. 378) :

"By an act of Congress passed July 1, 1836, it was provided 'that no act of a Territorial Legislature of any of the Territories of the United States incorporating any bank, or any institution with banking powers and privileges, hereafter passed shall have any force or effect whatever until approved and confirmed by Congress.' The charter of this bank was passed in 1857. Three of the notes were given on the 9th of June, 1858, and the fourth on the 28th of April of the same year.

The consideration of the three notes of the 9th of June was for a balance due the plaintiff from the Bank of Tekama *on a settlement of accounts;* and of the other, for moneys advanced to Campbell, the president, *to enable him to redeem the paper of the bank in circulation.*"

And (p. 379):

"At the trial the Court below, after referring to the act of Congress forbidding the Territorial Legislature to pass any law chartering a bank without its consent, and to the violation of this organic law in the present charter, and to the facts which had been proved, instructed the jury that the charter and the organization of the bank under it, as well as the banking business conducted and carried on through the means of this organization, were all illegal and void; and that if the plaintiff participated in these transactions, aiding and assisting the officers and directors in giving credit to the bank, and to its bills in circulation, thereby co-operating in the imposition and fraud upon the business community, with a knowledge of the illegality of the charter and of the organization of the bank, and that the consideration of the notes in question grew out of these illegal transactions, he was not entitled to recover.

"Verdict and judgment went accordingly for the defendants."

The case was brought to this Court on writ of error; and this Court held that the above instruction to the jury was correct.

Mr. Justice NELSON, delivering the opinion of the Court, said (p. 381):

"We perceive no valid objection to the charge given by the learned Judge below. It referred to the facts with great particularity and accuracy. The principle of law which it laid down is familiar, and the evidence in the case called for its application. The illegality of the charter of the bank and of the organization under it, as well as the business of banking conducted through its means, were matters not in controversy

upon the evidence. The only material question open was, whether or not the plaintiff was *particeps criminis*. If he was, he was disabled, under the maxim, to recover. The law leaves the party thus situated where it finds him. If either has sustained loss by the bad faith of his associates, it is but a just punishment for the illegal adventure.

To the argument of the counsel for the plaintiff that, admitting the banking transactions to be illegal, yet that the settlement of the balance and giving notes for the same purged the new promise, as he calls it, from the original taint—the answer is, that the new promise is founded upon the illegal consideration, a debt or demand growing out of the illegal transactions, and is as infirm, in the eye of the law, as the implied promise that existed previous to the giving of the notes."

See also to the same effect:

Williams vs. Cheney, 3 Gray (Mass.), 215, 222.

Jones vs. Smith, 3 Gray (Mass.), 500.

Ætna Ins. Co. vs. Harvey, 11 Wis., 394.

Lycoming Ins. Co. vs. Wright, 55 Vt., 526, 533.

Thorne vs. Trav. Ins. Co., 80 Pa. St., 15.

It has always seemed to us that this objection to the plaintiffs' recovery was fatal and insurmountable. We have never seen any answer to it; we feel sure that no answer can be made.

III.

THE RELEASE. (A) The Court erred in admitting in evidence the release by Sam. O. Smith & Co. (the owners of the cotton destroyed) to the defendant railway company, for this release showed on its

face that it was made after the action was begun, and the release was not set up in the pleadings. (B) But if the release was admissible in evidence, it showed that the plaintiffs had no cause of action, and for this reason the Court erred in the instructions which it gave.

The defendant duly objected and took exceptions to the admission of the release, and has made its exceptions part of this Bill of Exceptions (Record, pp. 19–20).

The release showed upon its face that it was not executed until after the commencement of the action (Record, pp. 6, 12–13; Release, Record, pp. 19–20). The complaint alleged that $17,000 was the full value of the cotton and that the insurance policies covered the entire value of the cotton (Complaint, Record, pp. 3, 4, 5). The evidence showed that the value of the cotton was over $17,000, namely, $18,179, and that the insurance was only $17,000 (Testimony of SAM. O. SMITH, Record, p. 16). The liability of the defendant, if any existed, was, therefore, not merely for damages equal to the amount of the insurance, but for damages in excess of the amount of the insurance. This being the case, the liability of the defendant, if any existed, was, as respects the damages in excess of the insurance, both really and nominally to the insured, and the insured should have been a party to the action. It was probably to avoid this difficulty that the plaintiffs introduced the release made by Sam. O. Smith & Co. to the defendant railway company, the apparent object being to show that Sam. O. Smith & Co. had released

the railway company from all liability *in excess of the amount of the insurance* or in excess of the amount paid by the plaintiffs on their policies to the insured, but the release does not show that fact; it is a release of "*all damages*" on account of the destruction of the cotton, and such is its legal effect.

Even if, however, the release could have been introduced merely for the purpose of showing a release of the liability of the Railway Company to Sam. O. Smith & Co., *in excess of the insurance, yet it could be so introduced only in a supplemental complaint*, for the release was made after the commencement of the action. The plaintiffs had alleged in their complaint that the insurance covered the full value of the cotton, and they could not be permitted afterwards to contradict that allegation by their evidence. If their evidence showed that this allegation was not true, and they wished to prove the facts as they really existed, they could do this only by setting up the facts in a supplemental complaint. The Code of Arkansas on this point is as follows:

"The plaintiff and defendant respectively may be allowed, on motion, to make a supplemental complaint, answer or reply, alleging facts material to the case occurring after the filing of the former complaint, answer or reply."

Mansfield's Digest, §5084.

The Court, therefore, erred in admitting the release in evidence against the objection and exception of the defendant.

(B.) But if the release was properly admitted in evidence, it showed that Sam. O.

Smith & Co. had released the defendant from ALL alleged liability on account of the destruction of the cotton, and NOT MERELY FROM THE LIABILITY IN EXCESS OF THE AMOUNT OF INSURANCE, and, therefore, that the plaintiffs had no cause of action.

The release put in evidence shows that Sam. O. Smith & Co., the owners of the cotton destroyed, made to the defendant Railway Company a release of "*all* damages that they may have any right to claim by reason of the destruction of any and all cotton caused by the fire in the City of Little Rock, on the 14th day of November, 1887" (Record, pp. 19–20). This release, introduced by plaintiffs, is part of the record in this case.

Now, if there had been no insurance, this release would have been a complete bar to any action by the insured, the owners of the cotton. This is clear.

It is equally clear that the insurance companies have no right of action (either in their own names or in the name of the insured), except *such as the insured would have had if there had been no insurance.*

Phœnix Ins. Co. vs. Erie Trans. Co., 117 U. S., 312.

Platt vs. Richmond, etc., R. R. Co., 108 N. Y., 358.

Simpson vs. Thomson, L. R., 3 App. Cas., 279.

The release above mentioned is therefore a complete bar to this action.

It is true that, in an action at law by the insurer in the name of the insured, the third person whose act

or neglect has caused the injury or destruction of the property cannot set up a release from the insured as a bar to the action, *if the insurer shows that the release was not given bona fide and for value.* But this is not such a case. The release stands alone and speaks for itself. Its *bona fides* is in no way impeached, nor could it be by the plaintiffs, for they introduced it in evidence. It shows on its face that the plaintiffs have no cause of action.

The *purpose* for which the plaintiffs introduced this release in evidence has nothing to do with the *legal effect* of the release when once it is in evidence. They cannot assert that they introduced it for one purpose and insist that it shall be used only for that purpose. The only question is, *what is the legal effect of the document?*

A case exactly in point is *Greenleaf's Lessee vs. Birth*, 5 Pet., 132. Mr. Justice STORY, giving the opinion of this Court, said (p. 137):

"It is not one of the least curious circumstances of this cause that copies of the same deeds were alternately offered as evidence for the same purpose by each of the parties, and successively objected to by the other, and rejected by the Court. *In the ordinary course of things the party offering such evidence is understood to waive any objection to its competency as proof.* But, without insisting upon this consideration, it is manifest that *if the proceedings in bankruptcy admitted by the Court were competent evidence at all*, they established the fact, not only of the bankruptcy of Greenleaf and the issuing of a commission against him, and the appointment of commissioners, but also of an assignment of his estate by them, first to Burd and afterwards to Miller."

The release, therefore, must be given its legal effect, which is that it is a complete bar to this action. The

Court, therefore, erred in giving to the jury the instructions which it gave (Record, pp. 120–121), to the effect that in certain events the plaintiffs were entitled to recover; it was error to instruct the jury that plaintiffs could recover at all or in any event.

IV.

The Court below should have instructed the jury, in substance, that (as the evidence showed that the defendant did not occupy the relation of common carrier, and hence of insurer of the cotton in question) in order to render the defendant Railway Company liable in this action it must be shown that the destruction of the cotton was caused by the act or neglect of the Railway Company, and that if the cotton was destroyed by any other cause or causes the defendant was not liable; also, that the act or neglect of the Railway Company, in order to render it liable, must have been the proximate and not a remote cause of the injury. On these points the Court below erred, both in its refusals to instruct the jury and in the instructions which it gave.

The instructions given and refused are set out at length in the Record (pp. 116–121). The defendant requested the Court to give the fourteen instructions

set out at pages 116–119, each and all of which the Court refused to give, and to such refusal the defendant duly excepted, and has made its exceptions a part of this Bill of Exceptions. The Court, of its own motion, then gave the instructions set out at pages 120–121, to the giving of all and each of which instructions the defendant duly excepted, and has made its exceptions a part of this Bill of Exceptions.

(A) The Railway Company did not bear the relation of common carrier to the cotton involved in this action; hence it is liable for the destruction of the cotton in question only in case its act or neglect has been such as would render liable any third person who had been guilty of the same act or neglect.

The evidence was clear and undisputed that, for the cotton of Sam. O. Smith & Co. (for the destruction of which this suit was brought), the defendant Railway Company had never issued bills of lading (Testimony of Sam. O. Smith, Record, p. 16); and that the Railway Company never had possession of the cotton, or any possession of or control over the sheds or street where the cotton was at the time when it was destroyed (Testimony of W. H. WRIGHT, Record, pp. 26, 27; SAM. O. SMITH, pp. 40, 71; A. R. BRAGG, p. 74). The evidence showed that the Railway Company merely furnished cars and switched them alongside the warehouse of the Compress Company, and that the cars were loaded by the Compress Company and afterwards

hauled away by the Railway Company (Testimony of W. H. WRIGHT, Record, p. 28; A. C. STILLWELL, Record, pp. 54–55; SAM. O. SMITH, Record, p. 71). The defendant's relation, therefore, to the cotton involved in this action was not that of a common carrier, but of an ordinary person—a "third party"—as respects the owner and the insurer. It is elementary law that in such a case the defendant is liable only in the same event that would render any third person liable, namely, that the injury or loss was caused by its act or neglect.

The following instructions which were requested by the defendants or their equivalents should therefore have been given (Record, p. 116 *et seq.*):

"1st. If the Union Compress Company, who is not sued in this action, was the owner, holder and in actual possession and control and management of the Compress warehouse and its contents, located at the foot of Main street, in the City of Little Rock, on November 14th, 1887, and if the defendant Railway Company had at that time no control or custody of, and exercised no right of management or ownership over said warehouse or its contents, then the mere fact that it had a lot of cotton there for which it had no receipts of said Compress Company would not make the defendant Railway Company liable for any damages growing out of the negligent burning of said Compress Company's warehouses if caused by negligence or want of ordinary care in the management of the same by the Union Compress Company, and without any fault on the part of the defendant proximately contributory to said injury.

4th. When the act or omission complained of as negligence is not in itself a distinct wrong to the party complaining, and can only become a wrong to any particular individual through injurious consequences resulting therefrom by or through the separate acts of others, there would be no liability upon the party originally committing the act or making the omission unless it appears from the evidence that the injurious conse-

quences arising therefrom were the natural results, in the ordinary course of events, of such act or omission.

5th. If at the time said cotton was burned, on the 14th of November, 1887, at the foot of Main street, it was in the custody, possession and control of the Union Compress Company, and upon premises over which the defendant Railway Company had no control, and if it owed no duty as a common carrier in relation to said cotton, and if, while in such custody and control, the cotton was set on fire by the act of some unknown person, with whom the defendant had no connection and of whom it had no knowledge, then the defendant Railway Company cannot be held liable in this action.

10th. If the jury believe from the evidence that the Union Compress Company allowed cotton to accumulate in its warehouse and neighborhood at the foot of North Main street in such quantities as to constitute a nuisance, without the assent or direction of the defendant company, and that the said Compress Company knew at the time that there would be delay on the part of the defendant in furnishing transportation to remove the same, and if you further believe that the defendant company had no management or control over said warehouse, nor over the delivery to or receipt by said Compress Company of cotton at that point, then the defendant company cannot be chargeable with the creation or maintenance of a nuisance, if any such nuisance then was, and on this point you will find for the defendant.

11th. If the jury find from the evidence that there was no contract or arrangement between the Railway Company and the Compress Company which contemplated the depositing of cotton in and upon Main street, but that the placing of cotton there, and the submitting of it to be placed there, was the sole act of the Compress Company and the owners of the cotton, and that the Railway Company had no control over the premises where the cotton was stored, then the defendant is not liable in this suit, even though the depositing of cotton in and upon Main street constituted a public nuisance.

12th. In order to make the defendant liable for the placing of cotton in and upon Main street the jury must find from the evidence that the defendant was a party to the arrangement or agreement by which the cotton was deposited in and upon said street, and the mere

fact that an arrangement existed by which the defendant issued bills of lading for cotton deposited in the compress warehouses, and had agreed to handle the same from said warehouses to Argenta, this fact of itself will not make the defendant liable for an injury which would not have happened except for the placing of cotton on the street itself.

13th. If the jury believe from the evidence that on the 14th day of November, 1887, a large quantity of cotton was destroyed which was stored in the street at the foot of Main street without authority from the authorities of the City of Little Rock, and that by reason of said nuisance the fire complained of was caused and created by which the damage claimed was suffered, nevertheless the jury cannot find the defendant Railway Company liable for the said injury unless they find that said defendant Railway Company either created said nuisance or authorized the same or was a party to the creation or maintenance of the same."

These instructions were clearly right. There was evidence not only "tending to prove" the facts stated as the hypotheses of these instructions, but proving those facts beyond a reasonable doubt. It is unnecessary here to rehearse the evidence; it is set forth at length in the Record, and the substance of the facts proved are stated in the "Statement of the Case," *supra*, (p. 8). The *law* as stated in these instructions is clearly right; and, as there was *evidence tending to prove, and even proving*, the facts stated as the hypotheses of the instructions, the Court erred in not giving them as requested, and in giving the instructions which it did give, below noticed.

The Court should have instructed the jury, as defendant requested, that the defendant is liable only in case its act or neglect was the *proximate cause* of the destruction of the cotton, and that the alleged delay of

the Railway Company to furnish transportation would not be a proximate cause of the destruction of the cotton. The 1st and 4th instructions requested by the defendant (Record, pp. 116, 117) raise this question, and correctly state the law, namely, that the defendant is not liable unless its act or neglect was the *proximate* cause of the loss. The Court erred in not giving these instructions and in not giving any to the same effect. This point, also arises and the law thereon is stated more fully in this brief, *infra*, in connection with the discussion of the instructions which the Court gave of its own motion (Record, pp. 120, 121). These we proceed now to consider.

The Circuit Court erred in the charge which it gave the jury, upon its own motion. The charge is set out at length in the Record (pp. 120, 121). Paragraph 1 of the charge states (Record, p. 120):

"The *complaint charges* that the defendant and the Union Compress Company, by *an agreement* between themselves and by a general course of business, made the cotton sheds of the Compress Company at the foot of Main street, a receiving station for cotton to be sent from this city by any one to the compress of said Union Compress Company in Argenta for compression, and that defendant should transport all cotton thus received."

The Court then goes on and states to the jury (Record, p. 120):

"The *agreement mentioned in the complaint* between the Union Compress Company and the defendant *is admitted in the answer.*"

A plain mistake on this vital point. Not only does

the answer not admit the alleged agreement, but it expressly denies it (Record, p. 7).

The answer on this point alleges :

"It denies that it ever made any contract with the said Union Compress Company by which it agreed or held out any inducement to the said Compress Company, or the public to receive cotton at its compress and warehouses at the foot of Main street, in the City of Little Rock, or anywhere else."

No denial could be more emphatic than this.

The answer then proceeds to state what was the fact :

"But it says it *gave the Union Compress Company a certain rate per carload*, whereby it agreed to haul all of the cotton *of the said Compress Company* from its compress and warehouses and sheds at the foot of Main street and elsewhere in the City of Little Rock to its compress in Argenta, whenever *it* should desire to transfer cotton from one place to the other."

That is, the Railway Company, as the evidence clearly showed, *merely fixed a rate* between the points named, and this rate was to apply to all the cotton that *the Union Compress Company* shipped in that season.

As to making the compress warehouses "*a receiving station for cotton*" a fact which the Court stated "is admitted in the answer," the answer states (Record, p. 8) :

"IT DENIES that it ever received any cotton from the foot of Main street from any person or persons whomsoever; *it denies that it ever made said point a depot or receiving station for cotton belonging to any person or persons whomsoever*, or that it had any right, power or authority so to do, but it says that the said property belonged entirely and exclusively to the said Union Compress Company, in which this defendant had no interest and over which it had no control."

The Court therefore erred in stating that "the agreement mentioned in the complaint between the Union

Compress Company and the defendant is admitted in the answer." It was, on the contrary, expressly denied; especially that part which alleged that the Railway Company made the sheds a "*receiving station.*"

The Court continues:

> The complaint charges * * * "and that the defendant failed to transport the cotton thus received promptly, but suffered it to accumulate at said cotton sheds and in Main street, a public highway of the city, until it became a public nuisance, and that by reason of said fire the cotton insured by it, mentioned in the complaint, was destroyed. * * * It is also admitted that the cotton did accumulate in said cotton sheds and at the foot of Main street and in said street, and that it was fired in said street (Record, p. 120).
>
> "The Court now instructs you that *by the said agreement it was the duty of the said defendant to transport the cotton thus received at said cotton sheds for shipment promptly to Argenta, and that if defendant failed to do so* and by reason of the continued reception of cotton at said sheds, and the continued giving of bills of lading therefor as often as demanded by shippers thereof, down to the day of the fire, cotton was suffered to accumulate at said sheds and on Main street until it endangered the property of others in the immediate vicinity and that mentioned in the complaint, then said defendant was guilty of aiding in the creation and maintenance of a public nuisance, and is liable for the loss mentioned in the complaint" (Record, p. 120).

Here, then, is an instruction to the effect that "*if the said defendant failed to transport the cotton thus received at said cotton sheds for shipment promptly to Argenta*" then, in certain events mentioned, it was "liable for the loss of the cotton mentioned in the complaint." The gist of the action—the thing for which the defendant is to be made liable—is thus stated by the Court as *the failure to transport the cotton promptly.* This fact would not, as we now proceed to show, be sufficient to

render the defendant liable, and the Court erred in instructing the jury as it did in this respect.

(B) The defendant Railway Company would not be liable for the destruction of the cotton by reason of its failure to transport the cotton promptly. The failure to do so was not the proximate cause (or any cause) of the destruction of the cotton.

The failure to transport the cotton promptly was not the *proximate cause* (or any cause) of the destruction of the cotton. The proximate cause was *the carelessness of the boys* with their cigarettes and matches. The action should have been against them. Or, if it be said that the cotton was improperly and negligently exposed to fire, then such exposure was *the act and fault of the Union Compress Company,* and the action should have been against that company. The Railway Company had no control over the sheds and warehouses of the Compress Company; it had no agent or employee upon the Compress Company's premises; neither had the Railway Company any right to say that the Compress Company should or should not receive cotton or store cotton in any quantity or manner it pleased. The buildings and cotton were wholly and absolutely under the exclusive care and control of the Compress Company. Of couse, if the owners of the cotton deposited it with the Compress Company knowing all the facts in regard to the accumulation and exposed condition of the cotton, they consented to their cotton being kept by the Compress Company in

that place and manner, and would have no right or redress against any one. That this was the fact is shown *infra*, Point V. But in no event could the Railway Company be liable by reason of its failure to transport the cotton promptly. There could be and was no causal connection between that failure and the destruction of the cotton.

The application of the term "nuisance" to the accumulated cotton adds nothing to the legal significance of the facts as they appear. The principles involved are precisely the same, whether this term be applied or not.

The law on this point—that the failure of a carrier to transport goods promptly is *not a proximate cause* of their destruction in a case like the present one—is well settled both in this Court and elsewhere.

A CASE IN POINT is *Railroad Company vs. Reeves*, 10 Wall., 176. Reeves sued the Railroad Company for damage to a quantity of tobacco received by it for carriage, the allegation being negligence and want of due care. The tobacco reached Chattanooga, and was received by the defendant Railroad Company on the *5th of March*. There was evidence which (it was claimed) tended to show that the defendant's agent promised that the tobacco should be carried forward the evening of the 5th. The Railroad Company failed to start the tobacco until the 6th. The train on which the tobacco started on the 6th was delayed by fallen rocks and washouts, and had to put back to Chattanooga, where, on account of the flood, it remained until after the 9th. On the 9th, in consequence of an unprecedented flood, the tobacco was wet and injured. *Had the tobacco gone off*

on the evening of the 5th it would not have been damaged.

A verdict and judgment thereon were rendered for the plaintiff, and the defendant brought a writ of error, upon which this Court reversed the judgment and ordered a new trial.

Mr. Justice MILLER, giving the opinion of the Court, said (p. 190):

"The second instruction given by the Court says that if, while the cars were so standing at Chattanooga, they were submerged by a freshet which no human care, skill and prudence could have avoided, then the defendant would not be liable; but if the cars were brought within the influence of the freshet by the act of defendant, and if the defendant or his agent had not so acted the loss would not have occurred, then it was not the act of God, and defendant would be liable. The fifth instruction given also tells the jury that if the damage could have been prevented by any means within the power of the defendant or his agents, and such means were not resorted to, then the jury must find for plaintiff.

In contrast with the stringent ruling here stated, and as expressive of our view of the law on this point, we cite two decisions by Courts of the first respectability in this country.

In *Morrison vs. Davis & Co.*, 20 Pa. St., 171, goods being transported on a canal were injured by the wrecking of the boat, caused by an extraordinary flood. It was shown that a lame horse used by defendants delayed the boat, which would otherwise have passed the place where the accident occurred in time to avoid the injury. The Court held that the proximate cause of the disaster was the flood, and the delay caused by the lame horse the remote cause, and that the maxim, *causa proxima, non remota spectatur*, applied as well to contracts of common carriers as to others. The Court further held, that when carriers discover themselves in peril by inevitable accident, the law requires of them ordinary care, skill and foresight, which it defines to be the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them.

In *Denny vs. New York Central Railroad Co.*, 13

Gray, 481, the defendants were guilty of a negligent delay of six days in transporting wool from Suspension Bridge to Albany, and while in their depot at the latter place a few days after, it was submerged by a sudden and violent flood in the Hudson River. The Court says that the flood was the proximate cause of the injury, and the delay in transportation the remote one; that the doctrine we have just stated governs the liabilities of common carriers as it does other occupations and pursuits, and it cites with approval the case of *Morrison vs. Davis & Co.*

Of the soundness of this principle we are entirely convinced, and it is at variance with the general groundwork of the Court's charge in this case."

[It is equally "*at variance with the general groundwork of the Court's charge*" *in the present case.*]

"As the case must go back for a new trial, there is another error which we must notice, as it might otherwise be repeated. It is the third instruction given by the Court, to the effect that if defendant had contracted to start with the tobacco the evening before, and the jury believe if he had done so the train would have escaped injury, then the defendant was liable. *Even if there had been such a contract, the failure to comply would have been only the remote cause of the loss.*"

So, also, in the present case, even if there had been any special contract between the defendant and the Compress Company to the effect that the Railway Company would transport the cotton promptly, still "*the failure to comply would have been only the remote cause of the loss.*"

Morrison vs. Davis, 20 Pa. St., 171 (referred to by Mr. Justice MILLER in *Railroad Company vs. Reeves*, *supra*), was an action against the defendants as common carriers upon the Pennsylvania Canal. It appeared that their canal boat, in which the plaintiff's goods were carried, was wrecked by reason of an extraordinary

flood; that the boat started on its voyage with a lame horse, and by reason thereof great delay was occasioned in the transportation of the goods, and that had it not been for this the boat would have passed the point where the wreck occured, before the flood came, and would have arrived in time and safety at its destination. The plaintiff insisted that inasmuch as the accident would not have occurred but for the negligence of the defendants in using a lame horse, therefore they were liable. But the Court held that the using of the lame horse was too remote a cause to make the defendants responsible for the loss of the goods, and that the immediate and responsible cause was the flood.

Denny vs. N. Y. Cen. R. R. Co., 13 Gray, 481 (cited by Mr. Justice MILLER, *supra*), was a case similar to *Morrison vs. Davis*. MERRICK, J., sufficiently states the facts in his opinion. He says (p. 484):

"This action is brought to recover compensation for damages alleged to have been sustained by the plaintiff in consequence of an injury to a quantity of his wool delivered to the defendants to be transported for him from Suspension Bridge to Albany. It appears from the report that the wool, directed to Boston, was received by them at the former and carried to the latter place, and was there safely deposited in their freight depot. But it was not transported reasonably nor with reasonable dispatch. By their failure to exercise the degree of care and diligence required of them by law it was detained six days at Syracuse, and consequently arrived at Albany so many days later than it should regularly have been there. Whilst it was lying in the defendant's freight depot in that city it was submerged by sudden and violent flood in the Hudson River. This rise of the water caused the alleged injury to the wool.

* * * * * *

It is now to be determined by the Court, whether the

defendants are, by reason and in consequence of their negligence in the prompt and seasonable transportation of the wool, responsible for the injury which it sustained after it was safely deposited in their depot at Albany. And we think it is very plain that upon the well-settled principles of law applicable to the subject they are not.

It is said to be an ancient and universal rule resting upon obvious reason and justice, that a wrongdoer shall be held responsible only for the proximate and not for the remote consequences of his actions. 2 Parsons on Contracts, 456. The rule is not limited to cases in which special damages arise ; but is applicable to every case in which damage results from a contract violated or an injurious act committed. 2 Greenl. Ev., §256; 2 Parsons on Contracts, 457. And the liabilities of common carriers, like persons in other occupations and pursuits are regulated and governed by it."

Hoadley vs. Northern Trans. Co., 115 Mass., 304, was an action of tort for the conversion of a steam engine delivered to the defendant for carriage under a bill of lading containing an exception of losses by fire, and destroyed by fire at the place of the delivery to the carrier while in his custody. One of the points decided in the case is thus stated by COLT, J. (p. 307) :

" The Court further instructed the jury against objection that the defendant would be liable, notwitstanding the exemption in the receipt, if it negligently detained the engine on the wharf after it ought to have been sent on, so that it was exposed to the fire and destroyed. The verdict was for the plaintiff on both grounds, and the correctness of this ruling is also called in question. The defendant insists that the negligence alleged cannot be treated in law as the proximate cause of the loss. In actions of this description the injury complained of must be shown to be the direct consequence of the defendant's negligence. This is the only practicable rule which can be adopted by Courts in the administration of justice. It is not enough that the act charged may constitute one of a

series of antecedent events without which, as the result proves, the damage would not have happened. The legal damages which follow any wrong are only such as according to common experience and the usual course of events might reasonably be anticipated. The defendant's liability extends only to natural and probable consequences.

Applying these rules to the case at bar, it is plain that the destruction of the goods by fire, in the calamity which happened could not reasonably be anticipated as a consequence of the wrongful detention of them on the wharf. The delay did not destroy the property, and there was no connection between the fire and the detention."

See also

Marsden vs. Assurance Company, L. R., 1 C. P., 232.
Daniels vs. Ballantine, 23 Oh. St., 532.
McCrary vs. Sioux City & Pac. R. R. Co., 3 Neb., 44.
Dubuque Wood, &c., Co. vs. Dubuque, 30 Iowa, 176.
Shearman and Redfield on Negligence, 4th Ed., §40, §33, n.

The Act of Arkansas of March 15, 1887 (Session Laws, 1887, p. 84), was cited by the Circuit Court in *Marine Ins. Co. vs. Ry. Co.*, 41 Fed. Rep., 643, 652, as authority for the following proposition :

" It will not avail the defendant to say that the cotton at the sheds was in the exclusive control of the Compress Company. As for the 1,463 bales for which it had issued its bills of lading, they are by law conclusively presumed to have been in its possession (Acts Ark., 1887, p. 84) ; and, as to the 1,211 bales for which bills of lading had been issued by the Memphis and Little Rock Railroad Company, they were held by the Compress Company subject to its orders, and as its agent."

The Act referred to has no bearing whatever upon the case, or upon the proposition for which it is cited by

the Circuit Court. The only provisions of the Act are: prohibitions against the issue of fictitious bills of lading; a provision making bills of lading negotiable; and a provision for imposing penalties for the violation of the Act. The only object to be attained by the Act was to make bills of lading good in the hands of a *bona fide* holder in the same manner as bills and notes negotiable by the law merchant. The Act does not say that goods upon which bills of lading have been issued shall be deemed to be in the possession of the carrier, either for the purposes of the Act or generally. The whole Act is in reference to bills of lading, and not at all as to the goods themselves.

There was nothing in the Act, therefore, to give the Railway Company even a *constructive* possession of the cotton in question, upon which it had issued bills of lading. But a constructive possession by the Railway Company of the cotton on which it had issued bills of lading would not render the Railway Company liable in the present case. It had issued no bills of lading to Sam. O. Smith & Co. for their cotton, for the destruction of which this suit is brought.

The only ground, therefore, of any liability on the part of the Railway Company would be that the Railway Company itself had negligently cared for, managed and stored the cotton on which it had issued bills of lading, and that the result of such negligence was the fire and loss of cotton of Sam. O. Smith & Co. This state of facts could not exist unless the Railway Company itself had *actual* possession of the cotton on which it had issued bills of lading; a *constructive* possession would not be sufficient. The question, in a case of tort committed by the use of certain things in a negligent

manner, is, who is *actually* controlling those things at the time the tort is committed. A person does not commit a tort who has only a constructive possession of a thing, with which thing some other person commits the tort. But the Railway Company never had any possession of the cotton, either actual or constructive. Even if the bill of lading Act above referred to might render a carrier liable to the holder in good faith of a bill of lading, yet the carrier would be liable to such person only by virtue of the bill of lading and of the Act; it would not be liable, even to the holder of a bill of lading, by virtue of any constructive possession of the goods. As to third persons who allege that their property is injured by reason of negligence in the care and management of the goods on which the bill of lading is issued, they must look to that person alone who has the *actual* possession of the goods. In the present case, the Railway Company had no actual possession of the cotton on which it had issued bills of lading. The Compress Company was not the agent of the Railway Company. The uncontradicted testimony shows that the Railway Company had no authority or control over the Compress Company, or over its buildings or premises, or over the cotton there stored. An agent over whom the principal had no authority or control whatever would, indeed, be a rare kind of agent.

The Court below, therefore, erred, in the respects above stated, in not giving the instructions as requested and in giving the instructions which it gave; and this Court should for this reason reverse the judgment and grant a new trial, unless it shall deem it proper to direct

(as claimed in Point I. *supra*) the Circuit Court to dismiss the complaint.

(C) The Court erred in taking from the consideration of the jury the evidence which showed that the failure of the Railway Company to furnish transportation promptly, if there was any such failure (which it denies), was not caused by its negligence, but by the unprecedented cotton crop of 1887; also in treating the subject of negligence as a matter of defense and assuming that the burden of proof was on the defendant.

Thus the Court erred in these respects in the instructions which it gave. It said (Record, p. 120):

"But the defendant alleges that it is not responsible for the loss of the cotton mentioned in the complaint because, owing to an unexpected demand on it for cars for the transportation of freight in the months of September, October and November, 1887, it could not furnish the means for transportation of the cotton received at the said cotton sheds promptly, according to its agreement."

* * * * * *

"*Its defense that it was hindered from transporting said cotton from the foot of Main street by reason of an unexpected pressure of business is not sustained by the evidence.*"

This instruction erroneously assumes that the question of negligence is to be treated as a matter of defence, and that the defendant is bound to prove that it was not guilty of negligence. But that is not true: the ground of the action is the alleged negligence of the defendant, and the plaintiffs must prove that as a

necessary part of their case, the burden all the time resting on them. This is not a common carrier action in which the carrier must prove his excuse, but an ordinary action of tort for negligence, and the plaintiffs must prove the negligence.

But for another reason also the Court clearly erred in giving this instruction. The only ground upon which the defendant Railway Company can be held liable to the plaintiffs or to the insured is that the defendant was guilty of negligence in not transporting the cotton promptly. *The relation of common carrier did not exist* between the defendant and the cotton of the insured on account of which this action is brought. If this action were brought on a common carrier liability, it might perhaps be no excuse for the carrier that, owing to an unprecedented crop of cotton, both in size and early maturity, there had been an unprecedented and unexpected demand upon the carrier for transportation facilities, which demand it could not meet; for such an event would probably not be deemed "an act of God," so as to excuse the carrier for delay. But that is not this case. The only possible ground upon which the plaintiffs can hold the defendant liable in this suit is for negligence, *i. e.*, the neglect of some specific duty which the defendant owed to Smith & Co., the owners of the cotton. The common carrier is held liable ordinarily, not because he is *negligent*, but because he is in a certain sense an insurer; that is, he is bound to deliver safely and promptly in any event, his only excuses being an "act of God or the King's enemies." The question of negligence in such cases is wholly immaterial. But in the present case the only possible ground of liability is negligence.

Now, there was no evidence to prove negligence on the part of the defendant; on the contrary, there was evidence not only tending to prove, but proving, that the defendant was not guilty of negligence in failing to transport the cotton promptly, and that its failure so to do was caused by circumstances over which it had no control.

The evidence showed that the cotton crop of 1887 was unprecedented, being unusually and unexpectedly large, and being brought to market unusually early in the season (Testimony of W. H. WRIGHT, Record, p. 27; A. P. HOWELL, pp. 32–33; SAM. O. SMITH, pp. 40–41, 71–73; JOHN G. FLETCHER, pp. 73–74; A. R. BRAGG, p. 76); also, that the accumulation and blockade of cotton existed elsewhere as well as at Little Rock (Testimony of A. P. HOWELL, Record, p. 32, bottom).

Notwithstanding this evidence, which was not contradicted or disputed, the Court instructed the jury that this particular defence "is not sustained by the evidence." It is true that if there had been "no evidence" tending to prove the defence, the Court would have been right in refusing to submit this question to the jury. But there was such evidence, and the Court erred in taking this question from the jury and assuming to decide it for itself; for, of the *weight* of evidence the jury, and not the judge, must decide. The only question for the Court is whether there is "*any* evidence."

"Whether there be *any* evidence or not is a question for the Judge; whether it is *sufficient* evidence is a question for the jury."

1 Greenleaf on Evidence, §49.

If, however, the Court in the present case meant to

decide that there was not "any evidence," then it erred in that decision also. In either view, then, this Court should, for the reasons stated, reverse the judgment of the Circuit Court and grant a new trial.

V.

The plaintiff insurance companies cannot maintain this action, for the reason that Sam. O. Smith & Co., the owners of the cotton, with full knowledge of all the facts as to the accumulation and condition of the cotton in the Compress Company's warehouse, and the danger to which it would be exposed, voluntarily placed their cotton there within the danger, and thus consented and contributed to the placing and keeping of the cotton in the place and manner in which it was kept, of which acts plaintiffs now complain as negligence.

The evidence shows clearly that Sam. O. Smith, when his firm placed the cotton in question on storage with the Compress Company, knew the condition and accumulation of cotton in its warehouse. Sam. O. Smith himself testified (Record, p. 17):

"Q. Did you know the condition of the cotton at the foot of Main street, in the compress shed, at the time?
A. Yes, sir.
Q. You knew of the accumulation of cotton there?
A. Yes, sir.

Q. You were secretary of the Compress Company?
A. Yes, sir.
Q. Did the Compress Company make any objection to your method of leaving your cotton there so long?
A. Yes, sir.
Q. What objection was made?
A. They said they were unable to take care of it; they only wanted to receive cotton for immediate shipment.
Q. You sent it there knowing that?
A. Yes, sir; we had no other place to put it."

The defendant requested the Court below to give the following instructions (Record, p. 118):

"7th. The Court instructs the jury that the plaintiff in this action has and holds no greater right to recover in this suit than he obtained by the right of subrogation from Sam. O. Smith & Co., by reason of having paid the insurance for the cotton destroyed.

"If, therefore, the jury find that the said Sam. O. Smith & Co. were guilty in any manner of creating or assisting in creating the nuisance complained of, or in maintaining or assisting to maintain the same, or were in any respects a party to the maintenance of the same, then they were parties to the creation and maintenance of said nuisance, and bars the plaintiff's right of action in this case, and, if you so find, your verdict must be for the defendant.

"8th. If the jury find from the evidence that Sam. O. Smith & Co., to whose rights the plaintiffs are subrogated, were guilty of contributory negligence, either in the erection or the maintenance of the nuisance upon which this action is based, or were a party to the same, then their contributory negligence is a complete defense to this action, and your verdict must be for the defendant.

"9th. If the insured, Sam. O. Smith & Co., deposited the cotton sued for in the warehouse at the foot of Main street prior to the time that it was ready for shipment, for the purpose of storing it at the sheds of the Compress and Warehouse Company until they could succeed in accumulating sufficient quantities to enable them to ship it in graded lots, and if this was done against the rules of the Compress Company, and over

its objection, and with knowledge of the blockade which existed at the warehouse, and of the danger to which the cotton would be exposed, they were guilty of contributory negligence, and the plaintiff cannot recover in this action."

The Court refused to give each and all of the instructions, and the defendant duly excepted and made its exceptions part of this Bill of Exceptions (Record, p. 118).

The Court, of its own motion, gave the following instruction (Record, p. 120):

"2. The defendant has pleaded further that it is not liable for the injury complained of in this case, because plaintiffs and Sam. O. Smith & Co., by their own negligence, contributed to said loss of said cotton; but the Court instructs you that there is no evidence to sustain this defense."

To this instruction the defendant duly excepted, and made its exception a part of this Bill of Exceptions (Record, p. 121).

But the instructions requested were clearly correct. The plaintiffs have no greater right to recover than Sam. O. Smith & Co. would have if they were plaintiffs.

Phœnix Ins. Co. vs. Erie Trans. Co., 117 U. S., 312, 321.

Platt vs. Railroad Company, 108 N. Y., 358.

Simpson vs. Thomson, L. R. 3 App. Cas., 279.

The fact that Sam. O. Smith & Co., when they placed their cotton in the Compress Company's warehouse, knew of the accumulation and condition of the cotton, and, knowing these facts, voluntarily placed their cotton within the danger, if danger there was, is a complete defense to any action by them for the destruction of the cotton. *They consented to the risk* and con-

tributed to their own loss. By their own voluntary act they added to the accumulation of cotton which plaintiffs in this action allege was the cause of the loss. The general rule expressed in the maxim *volenti non fit injuria* prevents any recovery in such a case. The authorities are clear on this point. The rule is stated by Chief-Justice TINDAL in *Gould vs. Oliver*, 4 Bing. N. C., 134, 142, as:

"The general rule of English law, that no one can maintain an action for a wrong, where he has consented or contributed to the act which occasioned his loss."

In that case timber, by the owner's consent, had been loaded on the deck of a vessel, and as a result was lost at sea. Though ordinarily the master of the vessel would be liable where goods loaded on deck are lost (even though "perils of the sea" be excepted from the contract), for the reason that it is negligence on his part to load goods on deck; yet, because the owner of the timber consented that it should be loaded in that manner, he was barred from recovery.

Mr. Justice CURTIS, also, in *Byam vs. Bullard*, 1 Curtis, C. C., 101, says:

"The general rule of the common law is *volenti non fit injuria;* and, in accordance with this maxim, no one can maintain an action for a wrong where he has consented or contributed to the act of which he complains."

The insured, Sam. O. Smith & Co., to whose rights the insurance companies are subrogated, both "consented and contributed to the act of which the insurance companies complain." They consented by placing their cotton in the Compress Company's warehouse, with full knowledge of the facts as to the accumulation

and condition of the cotton at that place; they contributed by adding 340 bales to the already accumulated cotton, thus increasing the danger of which the insurance companies now complain.

The rule of law was also well stated and applied in *Goldstein vs. Ch., Mil. and St. P. Ry. Co.*, 46 Wisc., 404. The complaint in that case averred in substance that the defendant Railway Company was negligent in providing an unsafe passageway for vehicles going to and from its freight depot; and that complainant drove along said passageway to the freight depot, and, as a result, both he and his team were injured. The Court held that as he went there voluntarily, knowing the danger, he was guilty of contributory negligence and could not recover damages from the Railway Company. LYON, J., giving his opinion, says (p. 406):

> "If a person places himself or his property in a position of known danger when he might avoid it, he is guilty of contributory negligence; and although the danger may have been caused by the negligence of another, if the party thus taking the risk of injury is injured thereby, he cannot maintain an action for damages against the other, because his own negligence contributed to the injury."

See, also, to the same effect:

Senior vs. Ward, 1 El. & El., 385.

Marq., Hough. and Ont. R. R. Co. vs. Spear, 44 Mich., 169 (COOLEY, J.).

Broom's Legal Maxims, 268, and cases cited.

The Court, therefore, erred in its instructions on this point.

VI.

Plaintiff insurance companies, when they issued their policies of insurance upon the cotton of Sam. O. Smith & Co., in question in this suit, had full knowledge of the accumulation and condition of the cotton in the Compress Company's warehouse; and, by issuing the policies with such knowledge, charging and receiving an extra premium therefor, two distinct legal consequences followed: 1st. They waived any and all right to complain that the keeping of the cotton in such place and manner was negligence, and 2d, the equity to a subrogation to the rights of the assured was thereby rebutted and destroyed.

The defendant requested the Court to instruct the jury as follows (Record, p. 116):

"2d. If the plaintiff insurance companies, at the time the insurance in question was taken out, insured the cotton and undertook to indemnify the insured against the destruction of the cotton by fire while the same was so placed and deposited in the street under such circumstances, that so placing and depositing the same constituted a public nuisance, then the plaintiff insurance companies, by their conduct aforesaid, aided and co-operated in maintaining such public nuisance, and cannot recover in this action, because by their conduct plaintiffs contributed directly to the cause of the loss."

The Court refused to give said instruction, and defendant, by its counsel, then and there duly excepted

to said ruling, and has made its exceptions part of this Bill of Exceptions. On the contrary, the Court instructed the jury that in certain other events the plaintiffs were entitled to recover (Record, pp. 120, 121). It was error to instruct the jury that the plaintiffs were entitled to recover at all, for the reason stated in Point V., *supra.*

As already stated, the insurance companies have in no event any greater right to recover than Sam. O. Smith & Co. would have had if they were plaintiffs (See cases, *supra*, p. 78). We have shown that Sam. O. Smith & Co. both consented and contributed to the placing and keeping of the cotton in the place and manner in which it was kept, of which acts plaintiffs now complain as negligence; and that for this reason neither they nor the plaintiffs are entitled to recover.

There is another sufficient reason why the plaintiff insurance companies cannot recover, namely, that *they* also, when they issued their policies of insurance upon the cotton in question in this suit, *had full knowledge of the accumulation and condition of the cotton in the Compress Company's warehouse* (Testimony of SAM. O. SMITH, Record, p. 18; L. B. LEIGH, insurance agent, Record, p. 104; J. F. BOYLE, insurance agent, Record, p. 105); *and charged an* EXTRA PREMIUM *on that account* (*Ib.*). This testimony was not contradicted or disputed. The policies described the cotton of Sam. O. Smith & Co. as "in street" (Policies, Record, pp. 13-15).

Notwithstanding such full knowledge on the part of the insurance companies, they issued their policies of insurance upon the cotton in question, and thus agreed to bear the loss if the cotton was consumed by fire *in*

the place and condition where it then was. Note this fact, that *the insurance companies issued their policies upon the cotton when it was in the very place and condition in which they now allege it was negligence to keep it.* Further, those policies were intended to be valid and were *valid only while the cotton remained in that place.* Note the language of the policies (Record, p. 13):

"*While contained in the frame sheds* Nos. 112 to 122, inclusive, and in brick shed and yard Nos. 115 to 123, inclusive, North Main street, *and on platforms adjoining and* IN STREET immediately between the two sheds."

Substantially the same language is found in all three policies (Record, pp. 13–15).

Having insured the cotton in question *in the very place and condition in which it was destroyed*, under *policies which by their express terms were to be valid only while the cotton remained in that place*, and having done this *with full knowledge of all the facts as to the accumulation and condition of the cotton* (their agents had personally inspected the premises before insuring the cotton, Record, pp. 18, 104, 105), plaintiff insurance companies *now*, for the first time, come into Court and allege that it was negligence to keep the cotton in the place and manner in which it was kept. *It is too late for them to make this allegation.* By their conduct in taking the insurance, with full knowledge of where and how the cotton was kept, they waived their right to assert that thus keeping it was negligence.

The principle of waiver here stated is a familiar one in law, especially in the law of insurance. Every person is bound to take advantage of his rights at a proper time, and if he does not do so he will be deemed to have waived them. The justice of this rule is obvious:

if a person, by keeping silence when he ought to speak, leads another person to believe that he will make no objection to certain acts or things, and that other person acts upon that belief to his injury, then the person who keeps silence ought not to be heard when he wants to speak.

This rule of waiver is frequently applied in the law of insurance; for example, a condition of a policy prohibiting the use or keeping of certain articles which make the risk extra hazardous is held to be waived if the agent taking the insurance knew that the prohibited articles were kept on the premises. And the same rule applies as to any other condition of the policy.

See Flanders on Insurance, 2d Ed., p. 358.
Wood on Fire Ins., 2d Ed., p. 1148 *et seq.*

The same doctrine is stated by this Court as follows:

"The doctrine of estoppel *in pais*, or by the act of the party, is founded in natural justice, 'and is a principle of good morals as well as law.' 'The primary ground of the doctrine is, that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted.' No one is permitted to keep silent when he should speak, and thereby mislead another to his injury."

Gregg vs. Von Phul, 1 Wall., 274, 281.

THE OTHER LEGAL CONSEQUENCE of the special and peculiar facts, hereinbefore referred to, which make this case *sui generis* is, that they had the effect, even if the assured had a right of action against the Railway Company, to rebut the right or equity of the plaintiffs to be subrogated to such right of action on the part of the

assured. The insurance companies had full knowledge of the *situs* and condition of the cotton in the Compress Company's warehouse and in the street. Before the insurance was made, the *situs*, location and condition of the property were examined by their agent; the policies described the cotton as situate in the street, and covered the cotton while it was in that situation and location and at no other place; the insurance companies charged and received an extra premium because of the location, situation and exposure of the property. They were paid an extra premium for the risk which they assumed and of which they now complain.

SUBROGATION IS A CHILD OF EQUITY; it is not a legal right. It arises out of the facts and circumstances of the special case. In every case in which the question of subrogation arises, that right must rest on the equities of the particular case; and we maintain with the utmost confidence, that the facts and circumstances of this case as above outlined rebut any equity to subrogation. Why, under the circumstances, should the plaintiffs have a right of recovery? They knowingly took this precise risk and were paid for it. The loss which happened was the very loss which was in their contemplation as one that might happen, when they issued their policies, and fixed and received the extra premium for assuming this precise risk. To allow them to recover is to allow them to receive and hold the premium without giving any consideration therefor, since the very loss which happened is the one which they were paid for insuring against; and if they are permitted to be subrogated and to recover in this action they never took and assumed any real risk whatever.

VII.

The testimony of the witnesses, H. G. Van Etten (Van Elten), C. E. Ferguson, L. W. Coy and J. H. Trump, as to an alleged failure of the Railway Company to supply sufficient cars for lumber shippers was irrelevant and collateral to the issue before the jury, and hence inadmissible as evidence, and it was error to admit it over the objection and exception of the defendant.

The issue was whether the defendant by its negligence caused the fire, or, if put in another way, whether the defendant by its neglect to furnish sufficient cars *to the Compress Company to transport its cotton* promptly caused the fire. Yet the Circuit Court, against the objection of the defendant, allowed the plaintiff to introduce testimony tending to show that the Railway Company failed to furnish certain *lumber dealers* with sufficient cars for transporting lumber (Record, pp. 59–65). This error is all the more apparent when it is considered that of all these witnesses only one had a mill at Little Rock. All the others referred to lumber mills, and failure to furnish transportation, at places far away from Little Rock. The wisdom of the rule excluding such testimony is confirmed in this case by the testimony (C. W. HEQUEMBOURG, Record, p. 94) to the effect that cars were *withheld from lumber dealers in order to furnish cars for shipping cotton.* Thus the testimony which was offered—that *lumber dealers* were not supplied with sufficient transportation

facilities—in order to prove a failure to furnish transportation for *cotton*, not only did not tend to prove the fact for which it was offered, but (with the explanation of the witness Hequembourg) tended to prove the exact opposite. The only effect of such evidence is to prejudice and confuse the jury, and withdraw their minds from the real issue. This testimony was clearly inadmissible. The ruling of the Court admitting it was excepted to by defendant at the time, and its exceptions made part of this Bill of Exceptions (Record, pp. 61, 62).

The rule is stated by MR. GREENLEAF as follows:

"Evidence must tend to prove the issue. * * * This rule excludes all evidence of *collateral facts*, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute; and the reason is that such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice and mislead them; and moreover, the adverse party having had no notice of such a course of evidence, is not prepared to rebut it. Thus, where the question between landlord and tenant was, whether the rent was payable quarterly or half yearly, evidence of the mode in which other tenants of the same landlord paid their rent was held inadmissible. And where, in covenant, the issue was whether the defendant, who was a tenant of the plaintiff, had committed waste, evidence of bad husbandry, not amounting to waste, was rejected. So where the issue was, whether the tenant had permitted the premises to be out of repair, evidence of voluntary waste was held irrelevant."

Greenleaf on Evidence, 14th Ed., §51 *a*, 52

In *Lincoln vs. Taunton Copper Mfg. Co.*, 9 Allen (Mass.), 181 (cited in note to Greenleaf on Ev., §52, *supra*), the action was for injury to plaintiff's land caused by the escape of noxious substances from the

defendant's factory, which were carried by water to the plaintiff's land. The plaintiff offered evidence tending to show the bad condition of similarly situated land upon the same stream between the plaintiff's land and the defendant's factory. The Court held that such evidence was inadmissible, saying (p. 187):

"But in the opinion of the Court, the plaintiff was not authorized to introduce evidence of similar alleged grievances suffered by owners of other lands. Such inquiries would present as many distinct issues as there were alleged cases."

Citing a similar case of alleged injuries from gas which escaped by alleged negligence of defendants therein (*Emerson vs. Gas Co.*, 3 Allen 410), the Court, continuing its opinion, quotes from the opinion in that case as follows:

"Each separate and individual case must stand upon and be decided by the evidence particularly applicable to it. * * * If such evidence was admissible, the issues in a single case might be indefinitely multiplied; and this would tend only to confusion and mislead the jury. * * * The plaintiffs could not establish or strengthen the evidence in their own case by any proof concerning the condition of or the injuries received by another person."

It is unnecessary to multiply authorities in support of this well-known rule. The record shows clearly that it was violated in the trial of the present case by the Court below. Hence, a new trial should be directed on this ground alone even if there were no other.

VIII.

The Court below erred in admitting in evidence the ordinance of the City of Little Rock, and Mayor's proclamation, set out at pages 66–67 of the Record.

The admission of this evidence was duly excepted to (Record, pp. 66–67). It was clearly immaterial and inadmissible against the defendant. The *defendant* was not guilty of any violation of the ordinance or the proclamation, and there was no evidence introduced at any stage of the trial tending in any way to show that the defendant violated them. On the contrary, the evidence proved conclusively that the defendant had no possession of or control over the cotton or of the premises of thecompany (Testimony, Record, pp. 26–27, 40, 71, 74; Facts, *ante*, p. 8), and could not, therefore, have been guilty of violating the ordinance or proclamation in placing the cotton in the street. The ordinance and proclamation could have been admissible only in case it was shown that the *defendant* violated the ordinance, and that by reason of such violation the cotton was destroyed; only in such case could they tend "*to prove the issue*," which was whether the defendant was negligent; and if so, whether its negligence caused the destruction of the cotton. The ordinance and proclamation in such a case might be introduced to show the character of the act, that is, that the act which defendant performed was negligent because it was illegal. But, as it *was not shown that the defendant did the act* which the ordinance and proclamation forbade, the evidence was immaterial, and should have been excluded

for the reasons stated under Point VII. *supra*. As Mr. GREENLEAF states (Vol. 1, § 52):

"Such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice and mislead them."

The Court therefore erred in admitting this evidence.

IX.

The Court should have admitted in evidence the petition and lease set out at pages 113-115 of the Record.

The defendant duly excepted to the Court's refusal to permit this evidence to be introduced (Record, p. 115). The petition and lease tended to show that the Compress Company was not performing an act which was negligent *because* illegal, in occupying Main street with its cotton, for the reason that that part of Main street had been leased by the city to that company, and that it had, therefore, a lawful right to occupy the same. The lease provided for a fifteen days' notice by the City Council to the Compress Company to remove its property (Record, p. 114). There was no evidence to show that any such notice had ever been given. The petition and lease offered in evidence clearly tended to show that the Compress Company was not guilty of performing a negligent, because an illegal, act in placing the cotton in the street.

The Court rejected the petition and lease which were

offered in evidence, on the ground that the City Council had no power to make such a lease (see *Marine Ins. Co. vs. Ry. Co.*, 41 Fed. Rep., 649). In this the Court was clearly mistaken. That part of the street in question (as is shown on the map, Record, p. 28) was a *cul de sac* ending at the top of an abrupt embankment. The only buildings abutting on this part of the street were owned or leased and occupied by the Union Compress Company. The only persons who would use that part of Main street with vehicles would, therefore, be persons who had business with the Compress Company. There was a gangway kept open for foot-passengers, for whom there were steps descending to Water street, as shown on the map, Record, p. 28. So far, therefore, as the public were concerned, that part of the street was not needed for public travel with vehicles.

Now, there was a statute of Arkansas enacted in 1885, and in force at the time when the street was occupied by the Compress Company, which enabled the City Council of Little Rock to make just such a lease (of just such a street) as that offered in evidence by the Railway Company. The statute is as follows:

"SEC. 3. That in order to better provide for the public welfare, safety, comfort and convenience of their inhabitants, the following enlarged and additional powers are hereby conferred upon cities of the first class, viz.:

* * * * * *

"SECOND. To alter or change the width of streets, sidewalks, alleys, avenues, parks, wharves and other public grounds, *and to vacate or lease out such other portions thereof as may not for the time being be required for corporate purposes, &c.*"

Acts of Arkansas, 1885, pp. 96, 97.

It is true the petition and lease offered in evidence

were dated July, 1883, before the statute above quoted was enacted. But the statute, though enacted subsequently, validates the lease, to the extent at least of taking away from the subsequent occupation of the street any alleged character of nuisance. The lease and the occupation of the street was a thing authorized by statute, and therefore could not be a nuisance by reason of being illegal. The City of Little Rock had made the lease and given its consent to the occupation of the street in accordance with the statute. The lease had, at the date of the fire, been acted on by both parties for several years. The lease provided for a termination by fifteen days' notice by the City Council. But such notice had never been given, and no act had ever been done by the city to attempt to annul or disaffirm the lease.

The statute above quoted and the lease which was offered in evidence therefore took away any character of nuisance from the occupation of the street by the Compress Company.

The Circuit Court (*Marine Ins. Co. vs. Ry. Co.*, 41 Fed. Rep., 649) referred to the lease as not assignable. It is true there is a condition in the lease against subletting or assignment. But there is no clause providing for forfeiture upon assignment, and it is well settled law that a lease is not forfeited or terminated in such a case except upon proper legal proceedings by the grantor, and that the assignee holds by a good title until such proceedings are had. A third party can not be heard to say that the assignee has no title.

Upon no theory could this evidence be properly rejected, while the ordinance and Mayor's proclamation

mentioned in Point VIII., *supra*, were admitted at the instance of the plaintiffs. If the ordinance and proclamation tended to show that the act of the Compress Company (*though it was not the act of the defendant*) was negligent because illegal, the petition and lease just as clearly tended to show that the act was not illegal, and, therefore, not negligent. The Court, therefore, erred in refusing to admit the petition and lease after having admitted for the plaintiffs the ordinance and proclamation.

X.

For the reasons above stated this Court should reverse the judgment of the Circuit Court, and either direct that Court to dismiss the complaint or to grant a new trial, as to this Court shall seem proper.

JOHN F. DILLON,
HARRY HUBBARD,
For the Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1169.

THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,

Plaintiff in Error,

vs.

THE COMMERCIAL UNION INSURANCE COMPANY ET AL.S.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

PLAINTIFF'S BRIEF IN REPLY.

JOHN F. DILLON,
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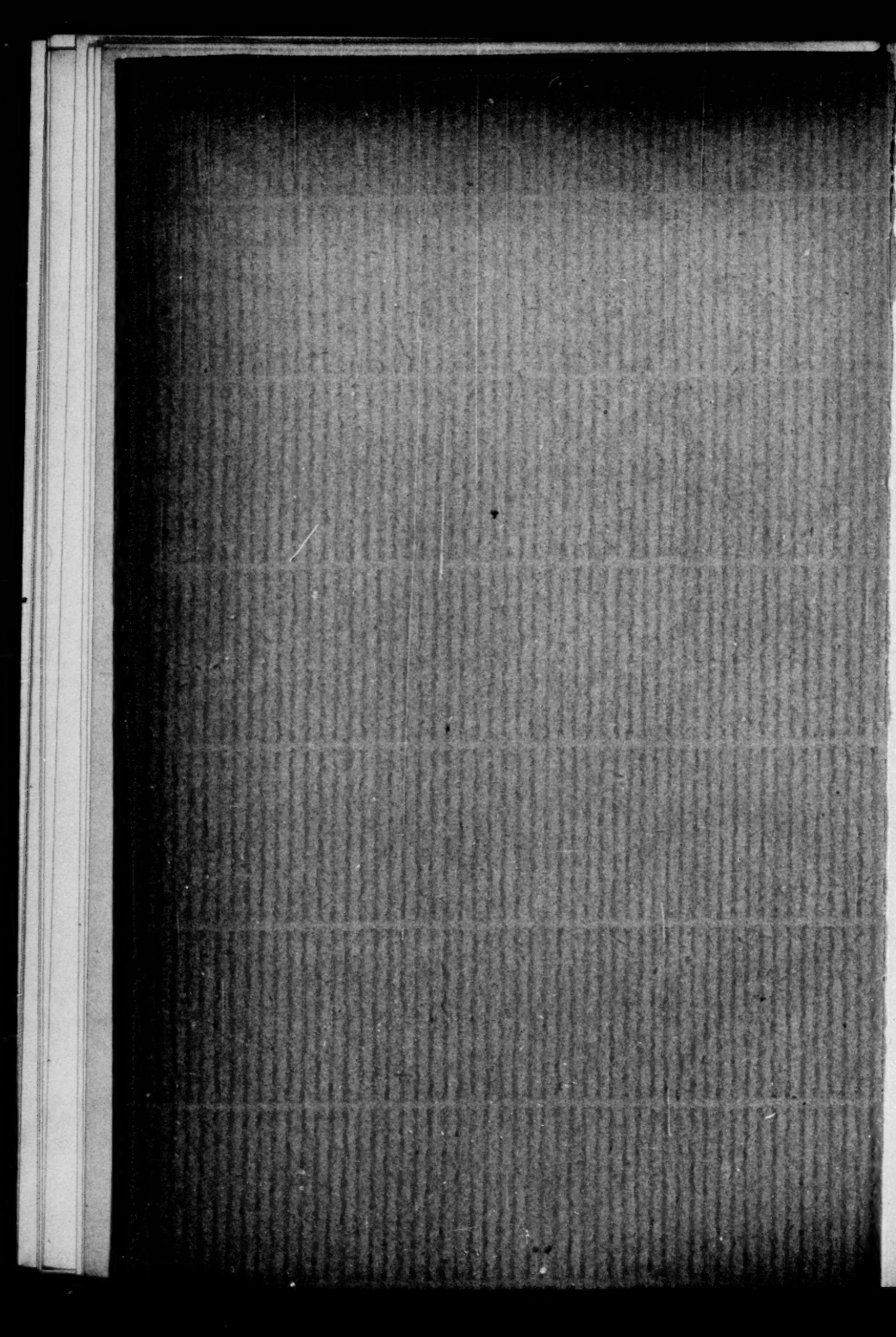

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Plaintiff's Brief in Reply.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

THE INSURANCE COMPANIES CANNOT MAINTAIN THIS ACTION IN THEIR OWN NAMES.

Counsel for defendants in error (Brief, p. 2) state that the objection was not made in the Court below, that the insurance companies cannot maintain this action in their own names without joining the insured, Sam. O. Smith & Co. It is impossible to see how the learned counsel could have fallen into this error. The Record, pages 6, 12–13, shows that the objection was

clearly and properly made, and the point several times argued in the Court below. See also the opinion of the same Circuit Court in *Marine Ins. Co. vs. St. L., I. M. & So. Ry. Co.*, 41 Fed. Rep., 643, 644, a case arising out of the same fire, where this question was discussed by the same Judge.

Counsel for defendants in error attempt also to make a point that this objection as to parties plaintiff does not arise upon the record. Their argument (Brief, p. 3) is, that the plea and demurrer, as to parties, appear in the bill of exceptions, that the bill of exceptions is signed by the Judge, and that a Judge has no power to certify the record. A complete answer to such a medieval objection is that the pleadings upon which the question as to parties plaintiff arises were properly certified by the Clerk of the Circuit Court, and appear as a part of the record so certified by him. These pleadings appear as a part of the record (outside of the bill of exceptions) at pages 5 and 6. It is true, the text of those pleadings are printed in full in the bill of exceptions. But there is a complete statement of these pleadings on pages 5 and 6 of the record, and a reference in each case to the bill of exceptions for the text of the pleadings. This reference to another part of the Record (for the bill of exceptions is part of the record) is equivalent to setting out *in extenso*, in that place where the reference is made, the full text of the pleadings. Such a reference from one part of the Record to another, in order to save unnecessary repetition in printing, is a practice not only sanctioned but commended by this Court (see *Railway Company vs. Stewart*, 95 U. S., 279, 284). The point thus attempted to be made by

counsel for defendants in error is, we feel bound to say, so frivolous as hardly to deserve mention. We hope it was not inspired by the Code Procedure, of which the learned counsel seems to be enamored.

Counsel for defendants in error (Brief, p. 4, *et seq.*), refer with a sneer, hardly befitting the lawyer or the Court, to our citation of certain common law decisions by Lord MANSFIELD, Mr. Justice BULLER and other eminent judges, under Point I. of our main brief (p. 18). They affect to regard the enactment of a Code of Procedure as the wiping out, as with a sponge, of the whole common law system of procedure. Such a view of the enactment of a Code is clearly erroneous. Codes are for the greater part only a reduction to writing of the common law rules of procedure, with such changes and additions as time and experience have shown to be desirable; and, for this reason, a consideration of the common law rules is of the highest necessity and importance in Code interpretation.

The Code of Procedure of Arkansas, like codes generally, does not repeal or profess to repeal the whole common law system of pleading and procedure; it merely codifies—puts in written statutory form—the common law system, with such changes and additions as the Legislature have deemed expedient. The sections of the Arkansas Code (§§ 4910, 5317, cited by counsel for defendants in error, Brief, p. 4) do not profess to repeal the whole common law system of procedure; they merely repeal the practice acts which had been passed in amendment of the common law, so far as the subjects of those

acts are covered by the Code. Under the provisions of the Arkansas Code (§ 4934), as is fully shown in our main brief (pp. 18, 27), the plaintiff insurance companies cannot maintain this action in their own names without joining the insured Sam. O. Smith & Co. This point was properly raised below and is properly before this Court, and is conclusive that the judgment should be reversed and directions given to dismiss the complaint.

Counsel for defendants (Brief, p. 10), argue "that if Smith (& Co.), the insured, was a necessary party, nevertheless the omission to have him made a party is not a reversible error." For this proposition they cite § 5083 of the Arkansas Code.

The provision of the Code (§ 4934) is clear and specific that in such a case as the present one the assignor *must* be a party to the action. This point was raised at the proper time and in the proper manner in the Court below. The question was not one in which the Court had a discretion; the terms of the Code are express and specific, and leave no room for discretion. When a party thus seeks (as did the defendant Railway Company in the present case) at the proper time and in the proper manner to have the Court enforce a right which is his by the positive provisions of statute, the Court is not at liberty to do otherwise than enforce it. It makes no difference whether the right given by the statute is a right of procedure or of substantive law; in either case it is a right which belongs to the party. Section 5083 of the Code, cited by counsel for defendants in error, does not au-

thorize or purport to authorize the Court to disregard the express and specific provisions of the Code. The provisions of that section (5083) are general, and are designed to authorize the Court to disregard those minor and technical errors which at common law would have been sufficient ground for reversal of the judgment. Such provisions of statute are common in all jurisdictions; but they have never been construed to extend to curing a defect of parties, when objection is taken to such defect at the proper time and in the proper manner, nor to curing any other failure to comply with the specific requirements of a statute or code, when the objection is properly made. A *general* statute or provision of a statute never overrides a *special* one. The argument of counsel for defendants in error goes to this length, that the Court is authorized by § 5083 to disregard any provision of the Code, however specific, clear, and positive such provision may be, whenever the Court chooses so to do; in other words, that the provisions of the Code, expressly enacted by the Legislature for the orderly procedure of the courts and the proper administration of justice, may be disregarded by the Court at its discretion; and, further, that if they are so disregarded by the trial Court, against the objection of one of the parties made at the proper time and in the proper manner, that party is without remedy on a writ of error. A statement of such an argument is its own refutation.

With all due respect for the learned counsel for the defendants we maintain that the authorities which they cite on the question of parties (Brief, pp. 4–21) do not

at all touch the question in the present case under § 4934 of the Arkansas Code.

THE PLAINTIFF INSURANCE COMPANIES CANNOT MAINTAIN THIS ACTION FOR THE REASON THAT THEY HAVE NOT COMPLIED WITH THE STATUTES OF ARKANSAS AS TO THE TERMS UPON WHICH FOREIGN CORPORATIONS ARE PERMITTED TO DO BUSINESS IN THAT STATE.

Counsel for defendants in error (Brief, p. 21, *et seq.*) make the following argument, and deduce a conclusion which is so clearly a *non-sequitur* that it is difficult to understand their mental process. This argument briefly stated is as follows:

(1) There is an Act of the Legislature of Arkansas which *applies especially to foreign insurance companies* and requires them to file certain documents with the *Auditor* of the State (Brief, pp. 21–23).

(2) There is also the Act (quoted in our main brief, p. 42), which requires *all* foreign corporations, before doing business in Arkansas, to file a certificate with the *Secretary* of State.

(3) Both these Acts are in force, and are not inconsistent with each other (Brief for Defendants in Error, p. 24).

From these premises the learned counsel deduce the the remarkable conclusion, that the plaintiff insurance companies, foreign corporations, are not required to comply with the act which requires *all* foreign corporations to file a certificate with the Secretary of State.

We will not waste the time of this Court in comment upon such logic. If the point made in our main brief (POINT II., p. 42, *et seq.*) upon the statute, admits only

of the answer made by the learned counsel in their brief, that brief really amounts to a confession of error.

THE COMPRESS COMPANY'S WAREHOUSE WAS NOT A "RECEIVING STATION" OF THE RAILWAY COMPANY.

Counsel for defendants in error repeat again and again the baseless statement that the Compress Company's buildings were a "receiving station" of the Railway Company. They do not refer the Court to any evidence to support such statement, and no such evidence is to be found in the record. The facts which the evidence proved on this point are stated fully and carefully in our main brief (p. 8 *et seq.)*, with references to the pages of the record where the evidence is to be found. From the evidence the Court will see that it clearly appears that the Compress Company's premises and buildings were not in any sense a "receiving station" for the Railway Company, but merely a cotton compress warehouse, which was the private property of the Compress Company, over which warehouse the Railway Company had absolutely no control whatever. The Railway Company received no cotton there from any one but the Compress Company; and it made no agreement to receive any cotton there from anyone but the Compress Company. In short, the Compress Company's warehouse was like the usual large warehouse: It was the private property of the Compress Company, and not the property of the Railway Company. For convenience, both of the Compress Company and the Railway Company, a railway siding was constructed alongside the warehouse, so that cotton could be

loaded directly from the warehouse upon the cars—a kind of arrangement usually effected where large quantities of goods are shipped in car-load lots, and where such siding can conveniently be constructed. There was nothing in the arrangement in the present case to make it different from the ordinary arrangements, such as are made in hundreds of cases by every large railway company. The fact that a very large part of the cotton annually shipped from Little Rock was shipped by the Compress Company from its warehouse did not change the character of the warehouse as the private property of the Compress Company; it was still the same in *kind*, though its business might be greater or less in *degree*. Even if every bale of cotton which was sent from Little Rock had been sent from the Compress Company's warehouse, still that fact would not have made the warehouse a receiving station for the railway.

From these facts it follows that the Railway Company was in no way responsible for the condition in which the Compress Company kept its premises; the Railway Company had no control over them and no duty in regard to them. Counsel for defendants in error cite a long list of cases to show that a person who maintains a nuisance is responsible for the consequences. We do not in the least deny that doctrine. But the *Railway Company* maintained no nuisance in the present case. Even if the accumulation of cotton and the piling of it in the street constituted a nuisance, still the Railway Company did not accumulate the cotton or pile the cotton in the street; it did not expose the cotton to danger of fire; it had no control over the Compress Company's premises, and no

right or duty to say how or where that Company should store the cotton in its possession. It cannot for a moment be contended that, because a railway company has a siding alongside of a warehouse, therefore the railway company is responsible for any nuisance that the owner of the warehouse may maintain upon his premises. Such a liability on the part of railway companies has yet to be adjudged by any court of final jurisdiction. That in such a case the mere delay of a railway company to furnish transportation facilities creates no liability on its part for the injury to or destruction of goods the transportation of which has been delayed, is perfectly well settled law in this Court and in other Courts. The delay by the carrier in such a case is not the proximate cause nor any cause of the loss. (*See our main brief, p. 64, et seq., and cases there cited.)*

THE COMPRESS COMPANY WAS NOT THE AGENT OF THE RAILWAY COMPANY.

Counsel for defendants in error (Brief, p. 39) state that the Compress Company held the cotton as *agent* of the Railway Company. This statement is clearly erroneous. There was no relation of principal and agent between the Railway Company and the Compress Company; but the relation, as to the cotton upon which bills of lading had been issued by the defendant Railway Company, was that of bailor and bailee, in which relation each party was a principal. The bailee is responsible for whatever injury is done by or with the goods while they are in his possession and under his control. The bailor has no control over the bailee, or

over the goods while they are in the bailee's possession; the bailor's only right is to call for a delivery of the goods according to the terms of the bailment. The doctrine of *respondeat superior* has no application; there was no agency; the Railway Company had no control over the Compress Company, and was not responsible for its acts.

THE CHARGE OF THE COURT AS TO THE AGREEMENT MENTIONED IN THE COMPLAINT.

Counsel for defendants in error (Brief, p. 51), apparently seek to show that the Circuit Court was right in its charge to the jury that "the agreement mentioned in the complaint * * * is admitted in the answer." Among other things counsel state that the answer is contradictory on this point. But this is not so, and the charge was clearly erroneous. The Court below first states to the jury (Record, p. 120):

"The *complaint charges* that the defendant and the Union Compress Company, by an *agreement* between themselves and by a general course of business, made the cotton sheds of the Compress Company at the foot of Main street a *receiving station* for cotton to be sent from this city by *any one* to the compress of said Union Compress Company in Argenta for compression, and that defendant should transport all cotton thus received."

The Court here states to the jury what the "*agreement*" was, namely, that the Railway Company had made the warehouse a "*receiving station*" for cotton for "*any one.*" The Court then proceeds to state (Record, p. 120), that "*the agreement mentioned in the complaint is admitted in the answer.*"

The fact was that the answer denied the agreement (Record, p. 7) as stated in the complaint, and then the

answer proceeded to state what was true, namely, that:

"It gave (*i. e.* named) the *Union Compress Company* (not the public) a certain rate per carload, whereby it agreed to haul all of the cotton of the said *Compress Company* from its compress and warehouses and sheds at the foot of Main street, and elsewhere in the City of Little Rock, to its compress in Argenta, whenever *it* should desire to transfer cotton from one place to another."

The answer (Record, p. 8) further expressly "*denies that it ever made said point a depot or receiving station.*"

The truth of the matter, as stated in the answer and proved by the evidence, was, that the Railway Company did nothing else with the Compress Company than to make the arrangement which is usually made between a railway company and the owner of a warehouse to which the railway company has a side-track. This arrangement was confined, as stated in the answer and proved by the evidence, exclusively to the *Compress Company* for cotton which *it* had as bailee. Now this is a far different thing from making the warehouse a "receiving station"—a place where the *public* may deliver goods to the *Railway Company.* No cotton was received by the *Railway Company* except such as had been first delivered by the owner to the Compress Company, and then by the Compress Company to the Railway Company. This arrangement is the common arrangement made by warehousemen along the line of a railway; and it has never yet been held that by reason of such an arrangement, the Railway Company makes the warehouse a "receiving station" for its road, or that the Railway Company thereby becomes responsible for

a nuisance which the warehouseman may choose to maintain on his premises.

The charge of the Court was, therefore, clearly erroneous. For further discussion of the point, see our main brief, p. 61 *et seq.*

The other points in the case are sufficiently treated in our main brief. For the reasons stated, the judgment of the Circuit Court should be reversed, and directions given to dismiss the complaint or to grant a new trial.

JOHN F. DILLON,
HARRY HUBBARD,
For the Plaintiff in Error.

Supreme Court of the United States

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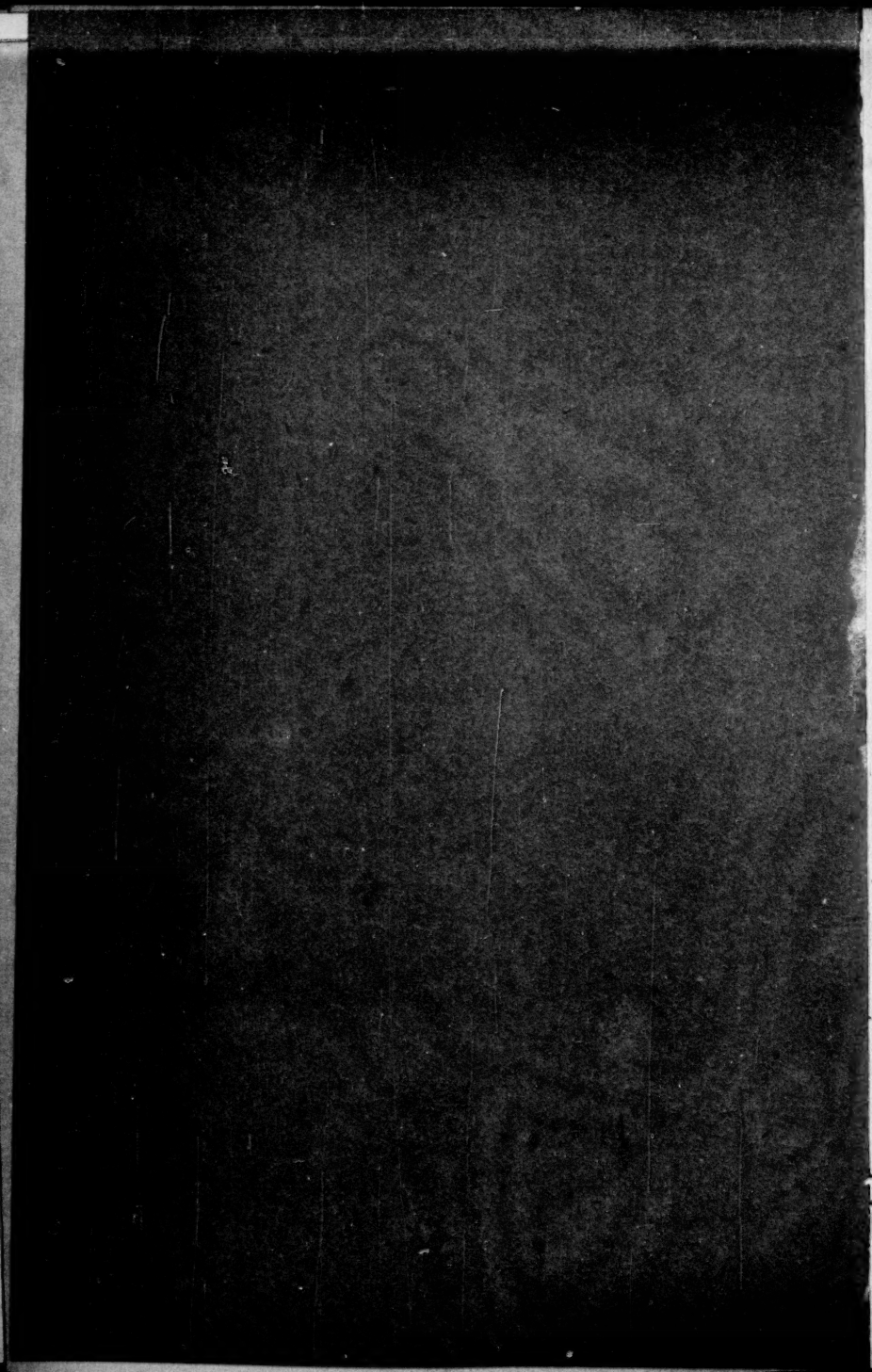

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BRIEF FOR DEFENDANT IN ERROR.

On the 21st day of September, 1889, the Commercial Union Insurance Company, a corporation created by the laws of England, the Sun Mutual Insurance Company, a corporation created by the laws of the State of Louisiana, and the Insurance Company of North America, a corporation created by the laws of the State of Pennsylvania, brought this suit at law in the court below against the St. Louis, Iron Mountain and Southern Railway Company, a corporation created by the

laws of the State of Arkansas, alleging in substance that prior to the 14th day of November, 1887, one Sam O. Smith had deposited in the sheds of the Union Compress Company, in the City of Little Rock, 340 bales of cotton, of the value of $17,000, and that while they were thus deposited the plaintiffs, on the application of said Smith, insured them against loss by fire for their full value; that from the 20th day of October to the 14th day of November, 1887, said defendant and said Union Compress Company, by their joint act, caused many other bales of cotton to be piled in the public street of said city adjoining said cotton sheds, so as greatly to obstruct the public use of said street, and so created a public nuisance, which was continued for three weeks or more, until the date last named, when said cotton in said street was fired accidentally or otherwise, by some person unknown to the plaintiffs; that said fire was communicated to said sheds, and destroyed the same, together with the cotton of Smith deposited therein; and that as said loss of said cotton was within the risks of said policies said Smith proved up the same, and the plaintiffs paid him the said sum of $17,000 on the ..... day of January, 1888; and that said payment was the full amount of the loss sustained by said Smith. (p. 2.)

There were two paragraphs in the complaint; but they both state the same cause of action.

The first assignment of error on the part of the appellant is to the effect *that suit should have been brought in the name of the insured.* (*Brief, p. 18.*)

As to this point it is enough to say that it was never made in the court below.

The judgment roll does not show what objections, if any, were made as to parties. The bill of exceptions sets out what purport to be a plea and a demurrer, raising a question as to parties.

It is not the office of a bill of exceptions to bring the pleadings on the record, and it is ineffectual for that purpose.

2 Thomps. Trials, sec. 2773.

"With legitimate matters of record it is not the office of a bill of exceptions to intermeddle; and so matters of record which only appear in the bill will not be noticed by the appellate court. No part of the function of a bill is to amend the records in any case whatever; but only to embody matters not otherwise properly appearing on the record."

Wells on Questions of Law and Fact, sec. 618.

It must be clear that a judge has no power to certify copies of records, either under the guise of making up a bill of exceptions, or otherwise, and that his certificate as to such copies gives them no evidenciary quality whatever.

Anthony v. Brooks, 31 Ark., 725.

Randolph v. McCain, 34 id., 696.

It is plain, therefore, that the transcript in this case does not bring to the notice of this court any question as to the parties to this suit.

If, however, we should pretermit that point, and consent to try this case *ore tenus*, the result must be the same. The plea and demurrer, copies of which are certified by the judge of the court below, made only the point that the assured ought to have been made a party. The suggestion that the second ground of demurrer that the complaint did "not state facts

sufficient to constitute a cause of action in favor of plaintiff," was designed to raise a question as to parties, is too far-fetched to deserve serious notice. It is the form of a general demurrer as prescribed by the code, which prescribes a distinct ground, to be stated when it is claimed that there is a defect of parties.

Pom. Rem., sec: 207, 287.

The assertion that the point arises out of instructions given is equally unfounded. So far as we know juries are never instructed as to the law governing the making of parties. Certainly nothing of the kind was done in this case.

Counsel cite cases decided in England of ancient date, and also cases decided in States where the system of common law pleading prevailed; but such decisions have no relevancy in the present proceeding. Counsel say that the court below failed "to apprehend the common law rule above stated." With all due respect, it seems to us that the common law rule thus referred to had been abolished by statute.

Mr. Pomeroy says:

"It may now, I think, be regarded as the established doctrine that the code in each of the States is the only source of authority from which rules of pleading may be drawn, that its methods have completely supplanted those which preceded it, so that the latter can no longer be appealed to as possessing of themselves any force and authority."

Remedies and Remedial Rights, sec. 515.

In Arkansas this is a rule specially prescribed by statute.

Mansfield's Digest, secs. 4910, 5317, (1884.)

Notwithstanding the obvious fact that the common law system of remedies, with all of its technicalities, contrived, it

would seem, to defeat justice rather than to promote it, has been completely overthrown, supplanted and superseded in Arkansas as well as in the land of its origin, we have here in this case labored citations from Douglas' Reports for the purpose of advising us as to the manner in which a suit should be brought at the present day. We are gravely reminded, with all the force of italics, that this is an action at law, as if the ancient rules governing such actions were necessarily immutable; rules adopted at a time when, as was well said by C. J. Coleridge, lawyers seemed to think that suits were not brought for the purpose of enforcing rights, but with a view to settle curious questions of pleading and practice. Counsel quote from Buller and Mansfield; but it may be remarked that, however eminent those judges may have been in respect both of learning and ability, their decisions as to matters of procedure only serve to show the evils that brought about the reformation that put an end to them. After all, Douglas' Reports only go back something over a century. How much more satisfactory it would have been if counsel could have found something in Plowden, or in the Year Books, or better still, in the Francic Formulæ apud Lindenbrog, the Capitularies by Baluzius, or the Assizes de Jerusalem. We infer from the fact that no citations are made from these ancient volumes that their authors are silent on the subjects under discussion, or that their views are not favorable to the contention of the plaintiff in error.

We are not sure that we understand precisely what is meant by counsel in saying:

"In those States where the codes require or permit all actions to be brought in the name of the real party in interest

(with no exceptions) it has been decided with doubtful correctness, and apparently without much consideration, that the insurer may sue in his own name. * * * But, however this may be, the codes of those States contain no such provision as is contained in section 4934 of the Arkansas Statutes above quoted."

But this statute thus referred to contains no exception whatever, nor the semblance of one. It reads as follows:

"Where the assignment of a thing in action is not authorized by statute the assignor must be a party as plaintiff or defendant."

If there is anything in this provision to prevent the bringing of the suit in the name of the real party in interest we are not able to perceive it. In saying that the cases referred to were decided apparently without much consideration, counsel evidently mean to intimate that the judges who decided them had not read Buller and Mansfield on Code Pleading, and that they were not aware of the fact that Judge Lawrence of Illinois was of the opinion that the common law system of pleading was the perfection of human reason, and that, being as old as original sin, it ought never to be changed.

The supposed exception is no exception at all. The suit must in any event be brought in the name of the party in interest; but in the given case the assignor must be made a party; not necessarily plaintiff, for he may be made a defendant.

Speaking of this provision requiring the assignor to be made a party when the instrument sued on is not assignable by statute—in itself an unfortunate survival of common law technicalities, absent from the codes of most of the States—Mr. Pomeroy, in referring to the assignor, says:

"And even though he may retain some residuary, contingent or equitable interest, the assignor is not the proper party to sue."

Pom. Rem., sec. 135.

But in this case there was no assignment. In cases of the subrogation of the insured to the right of action of the insurer on payment of a loss, no one probably ever spoke of the one as being an assignor, and the other as being an assignee. The tatute could not have been intended to apply to derivative titles generally, but only to cases of assignment by contract. Certainly an assignee in bankruptcy might sue alone without making the bankrupt a party.

Cases of the assignment of mortgages and other securities, dependent on the assignment of the debts secured, have no application; for in them the assignment of the debts is a matter of contract, to which the securities are allied as mere incidents; so that the whole transaction rests upon a contract.

Counsel say that the court in the Marine Insurance Company case erred in saying that the insurer had an interest in the property from the time of the insurance. This is a quibble. The meaning of the court is very clear; it is not that the insurer had any title in the property, but that out of its relation to it the insurer was susceptible of a loss in respect thereof, and that upon sustaining and paying the loss, the right to a remedy in favor of the insurer as against a wrong-doer causing the loss sprang into existence, irrespective of any contract of assignment. That the insurer from the time of the issue of the policy had that kind of an interest in or about the property insured is obvious from the fact that a stranger paying the amount of the loss to the owner would acquire no right of

action. It is true that the right is derivative, as indeed are nearly all legal rights; but the statute relates only to assignments, meaning, of course, assignments within the ordinary legal import of the term. It is very true that the claim of the insurer is limited by that of the insured, and that he must necessarily claim through the latter, as was said in *Phœnix Ins. Co. v. Erie Transportation Co., 117 U. S., 312;* but he does not claim by assignment, nor through any voluntary transfer by the insured.

There is a familiar principle in the law of partnership that is exactly similar. Partnership creditors have a right to have partnership assets applied in payment of partnership debts. They "are said to have a privilege of preference, sometimes loosely denominated a lien, to have the debts due to them paid out of the assets of a firm in course of liquidation, to the exclusion of the creditors of its several members. Their equity, however, is a derivative one. It is not held or enforceable in their own right. It is practically a subrogation to the equity of the individual partner, to be made effectual only through him. Hence if he is not in a condition to enforce it, the creditors of the firm cannot be."

Case v. Beauregard, 99 U. S., 124.

Yet no one ever spoke of this right of the partnership creditors as a thing having its origin in an assignment. As to whether the members of the partnership should be made parties to a suit brought by the creditors would depend on the question as to whether they had any longer any interest in the property sought to be subjected.

In referring to the case of *Railroad Co. v. Dow, 120 U. S.,*

287, counsel say that the mortgage referred to in the decision bore 8 per cent. interest instead of 10. We are not disposed to underate the brilliancy of this discovery; but if it has any bearing on the principle involved, that fact has not been pointed out. We may offset it by saying that counsel have twice misstated the title of the case.

In that case the trustees in a railway mortgage paid off a prior mortgage made to secure bonds drawing 8 per cent. conventional interest, the legal rate being 6 per cent., and brought suit to enforce the prior mortgage, claiming by subrogation. There was a decree in the court below in favor of the plaintiffs; and that court, proceeding on the theory that subrogation was equivalent of an equitable assignment, allowed the trustees interest on the money paid by them at the conventional rate. That was the contention of counsel for appellees in that case in this court. But the court held that "the right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice, and is independent of any contractual relations between the parties."

It was, therefore, not an assignment, and the trustees were only allowed 6 per cent. interest. Had it been an assignment, they would have been assignees of the interest as well as of the principal.

What counsel in this case say of that decision, is conclusive evidence that no kind of authority can ever silence contention.

"In the first place it is to be noted that that was a case of subrogation in the proper sense of the term, the debt in that

case having been extinguished by payment, while the present case is not one of subrogation proper, but of assignment, the obligation, if any, of defendant railway company for the tort, still continuing in existence after the payment of the insurance companies to the insured." (Brief, 38.)

We are not able to perceive the force of this distinction. In both cases the liabilities remained notwithstanding the payment; and that is what subrogation means. In the Dow case the payment by the trustees did not extinguish the prior mortgage, which still remained in force, the lien of which was enforced by the decree directed by this court.

We are further of the opinion that *if Smith, the insured, was a necessary party, as contended for by counsel, nevertheless the omission to have him made a party under the circumstances appearing in the record in this case, is not a reversible error.*

The Arkansas Civil Code provides as follows:

"The court must in every stage of an action disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

Mansfield's Digest, sec. 5083.

Sannoner v. Jacobson, 47 Ark., 44.

The plain meaning of the statute is that the statutory rules of procedure—and there are no others—are directory only; mere means for the attainment of justice, and in no sense objects to which justice shall be sacrificed.

Washington v. Love, 34 Ark., 94.

Admitting, then, all that is contended for on the part of the appellant, that, as a matter of form and symmetry, the insured should have been made a party plaintiff or defendant,

yet is it true that the appellant has lost any substantial right by reason of the omission complained of? This is a question that answers itself. After making and tendering the release, and thereby consenting that judgment should be rendered in favor of the insurers, it must be obvious that the insured can never sue for any damage sustained in his own right.

Railway Co. v. McCarthy, 96 U. S., 258.

Philadelphia R. Co. v. Howard, 13 How., 307.

Bigelow Est., 717.

Smith, the insured, was present in court during the trial, and testified on the part of both the plaintiffs and defendant; he also executed the release that was produced; and he is as much bound by the judgment as if he had been a formal party to the suit. In *Robbins v. Chicago City, 4 Wall, 672*, this court said:

"Parties in that connection include all who are directly interested in the subject matter, and who had a right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment. Persons not having those rights substantially are regarded as strangers to the cause; *but all who are directly interested in the suit, and have knowledge of its pendency, and who refuse or neglect to appear and avail themselves of those rights, are equally concluded by the proceedings.*"

How, then, is the plaintiff in error injured in any substantial right by reason of the fact that Smith was not made a party?

Complete justice having been done between the parties, there is no ground for reversal.

The federal statute of jeofails is quite as liberal as the

State statute, and it has been as liberally construed, as the following citations will show:

"But the allowance and refusal of amendments in the pleadings, the granting or refusing new trials, and indeed most other incidental orders made in the progress of a cause before trial, are matters so peculiarly addressed to the sound discretion of the courts of original jurisdiction, as to be fit for their decision only, under their own rules and modes of practice. This, it is true, may occasionally lead to particular hardships; but, on the other hand, the general inconvenience of this court attempting to revise and correct all the intermediate proceedings in suits, between their commencement and final judgment, would be intolerable. This court has always declined interfering in such cases; accordingly it was held by the court, in *Woods v. Young, 4 C., 237*, that the refusal of the court below to continue a cause after it is at issue, is not a matter upon which error can be assigned; that the refusal of the court below to grant a new trial is not a matter for which a writ of error lies (*5 C. 11, 187, and 4 W., 220*), and that the refusal of the court below to allow a plea to be amended, or a new plea to be filed, or to grant a new trial, or to continue a cause, cannot be assigned as a cause of reversal or a writ of error. We can perceive no distinction in principle between these cases and the one before the court. We must take the declaration, including the amendment, as we find it on the record. Nor can we interfere because the court below did not, as it ought, require the costs formerly accrued to be paid as a condition of the amendment."

Wright v. the Lessee of Hollingsworth, 1 Peters, 168.

"Allowing amendments is incidental to the exercise of all judicial power, and is indispensable to the ends of justice. Usually, to permit or refuse, rests in the discretion of the court; and the result in either case is not assignable for error. This subject was fully examined in *Tierman's Executors v. Woodruff, 5 McLean, 135*. It is therefore shown that both in the English and American courts amendments have been allowed in well-considered cases, for the purpose of introducing into the suit a new and independent cause of action."

Tilton et al. v. Cofield et al., 93 U. S., 166.

In the case in *5th McLean*, cited by the court, the court referred to *Taylor v. Lyon, 5 Bing., 333*, where the plaintiffs had

sued as surviving administratrixes of a deceased person. It appeared that no administration had been granted, though the attorney had supposed differently when he brought the suit; also, that the plaintiff might have sued as surviving partner of such deceased person. Leave was asked to amend by making the suit one in favor of the plaintiffs as surviving partners, and it was granted.

In that case Best, C. J., said:

"Questions for amendment are now generally allowed at every stage of the pleadings for the advancement of justice. The question usually is: 'Will any injustice be done by what is proposed?' and if not, the amendment is allowed."

This was in the year 1829.

The opinion in the case in *5th McLean* is worthy of being cited by this court as it was. In that case the amendment consisted in the introduction of a new cause of action.

"The section of the law referred to directs the courts of the United States to proceed and give judgment according as the right of the cause and matter in law shall appear to them, without regarding any imperfections or defects, or want of form in the writ, declaration, or other pleading, return, process, judgment, or course of proceeding whatever, except those only in cases of demurrer, which the party demurring shall specifically set down and express, together with his demurrer, as the cause thereof. This is a remedial statute, and must be construed liberally to accomplish its object. It not only enables the courts of the United States, but it enjoins it upon them as a duty, to disregard the niceties of form, which often stand in the way of justice, and to give judgment according as the right of the cause and matter in law shall appear to them."

Park v. Turner, 12 How., 46.

Again the court said:

"It must be admitted that Congress acted wisely in de-

claring that no litigant party should lose his right in law for want of form; and in going one step further, as Congress unquestionably has done, by declaring, that, to save the party's rights, the substance should be infringed on to some extent, when contrasted with modes of proceeding in the English courts, and with their ideas of what is substance."

Stockton v. Bishop, 4 How., 168.

In speaking of verdicts, a subject not expressly mentioned in the statute, the court in another case said:

"Admitting that this verdict is not technically responsive to the several pleas, it virtually answers and negatives them all; for if all or either of the pleas had been true, the verdict was untrue. Should the judgment then be arrested this would be done neither from necessity to guard the merits of the controversy, nor from the principles of sound inductive reasoning; but solely in obedience to an artificial and technical rule, which, however, it may be founded in wisdom and be promotive of good in general, yet, like all other rules, is capable of producing evil when made to operate beyond the objects of its creation. It was to prevent the mischief ensuing from a misapplied rigor that statutes of jeofails have been enacted; and their salutary influence is invoked whenever the intrinsic merits of parties litigant would, without that influence, be sacrificed to mere modes and forms of practice. By the thirty-second section of the acts to establish judicial courts of the United States, it is provided: 'that no summons, return, writ, process, judgment, or other proceedings in civil causes in any of the courts of the United States, shall be abated, arrested, quashed or reversed, for any defect or want of form, but the said courts respectively shall proceed and give judgment according as the right of the cause and matter in law shall appear to them, without regarding any imperfections, defects, or wants of form, in such writs, declaration or other pleading, return, process, judgment, or course of proceeding whatsoever, except those only in cases of demurrer, which the party demurring shall specially set down and express, together with his demurrer as the cause thereof.' It is true that a verdict *eo nomine* is not comprised within this provision of the statute; but judgments are, and the language of the provision, 'writ, declaration, judgment, or other proceedings in civil causes,' and further, 'such writ, declaration, pleading, process, judgment, or other proceeding whatsoever,' is sufficiently comprehensive to embrace every conceivable step to be taken in a cause, from the emanation of the writ down to the judgment.

The court have shown that the proceedings in this cause were according to the right of the case, that they brought into view the real merits of the parties litigant before the jury; they therefore consider both the verdict and judgment are within the terms and intent of the statute, and ought to be protected thereby."

Roach v. Hulings, 16 Peters, 322.

That the making of the assured a party to the suit would not have ousted the jurisdiction is plain, as Smith was a citizen of Arkansas (Tr., 18), and could have been made a defendant.

The only object of the statute in requiring assignors to be made parties is to settle all controversies likely to arise in one suit, and to protect the defendant against a subsequent suit on the part of the assignor.

Heartman v. Franks, 36 Ark., 504.

But where the suit is brought by the assignee, and during its pendency, the assignor puts himself on record as having no claim to urge against the defendant, the entire object sought to be attained by the statute has been fully accomplished.

It is true that the complaint alleged that the amount of the insurance paid equaled the full value of the cotton. Absolute and unqualified harmony between allegations and proof is not required; nor is it indeed generally attainable. Certainty to a common intent is all that is required. Even according to the strictest rules of the common law, where the payee of a bill sued the drawer, alleging demand and notice, he might show in lieu thereof circumstances that excused demand and notice, because the legal effect was the same. In this case if Smith did not claim anything over and above the amount of the in-

surance, the result to the defendant was just the same as if the insurance had covered the whole value of the cotton. If the defendant had claimed to be surprised by the admission of the testimony as to the release, another question would have been raised; but no such claim was made; and considering the extreme susceptibility of the profession to the emotion of surprise, the fact that none was manifested, justifies the belief that substantial justice was done. More than that the law cannot give and does not profess to bestow.

As the matter stands, the defendant got the benefit of Smith's claim, $1179, without paying anything for it. No other injustice is shown.

Smith, in his testimony, says that it was intended by the parties that the insurance should cover the entire value of the cotton; but that it turned out otherwise. It is easy to be inferred that at the time the suit was brought the plaintiffs supposed that they had paid the full value of the property insured. If they were in error, and Smith should stand in the attitude of one making a claim, it might be held that the suit should not go on unless he was made a party, as the controversy could not be wholly settled in the one suit. But the entire controversy has been settled; and if the case were sent back again, the litigation would have to be repeated, without involving a single point of contention that has not already been adjudicated. A more thorough example of the "way not to do it" could hardly be imagined.

In *Harvey v. Cook, 4 Russ., 34*, the court held that a defect of parties might be cured at the hearing by the undertaking of the plaintiff to give full effect to the utmost rights which the

absent party could have claimed, those rights being such as did not affect the rights of defendants.

So in *Bawtree v. Watson, 3 Mylne & Keene, 339.*

In the case of *Conolly v. Taylor, 2 Peters, 556,* an alien and a citizen joined in a suit against defendants, whom the citizen plaintiff was not competent to sue, and thereupon the citizen plaintiff's name was stricken out; and it was held that the court had jurisdiction, and might proceed to a decree.

It was much argued in that case by very distinguished counsel that the court could not allow the question to be affected by the consideration of anything done after the suit was brought; but the court held otherwise.

The decision in *Vatter v. Hinde, 7 Peters, 261,* is entirely conclusive.

In that case it was held that, though the complainant was obliged to join a party within the jurisdiction in order to obtain a final decree, yet if his joinder would defeat the jurisdiction, and the decree could be so framed as not to affect his interest, his name might be stricken out, and that thereupon the suit might proceed against the other defendants.

It was objected that the matter must be regarded solely in the light of the situation that existed at the time that the suit was brought; but C. J. Marshall, after citing the case of *Conolly v. Taylor, 2 Peters, 556,* said:

"The case is, we think, in point. A decree between all the original parties could not have been made. Those plaintiffs, who had a right to sue all the defendants, had in their bill united with themselves a person between whom and one of the defendants the court could not take jurisdiction. By striking

out his name the impediment was removed, and the jurisdiction between the other parties remained as it would have stood had his name never been inserted in the bill. The court could perceive no objection founded in convenience or in law to this course."

In *Harris v. Rowan, 4 Wash. C. C., 202, 208*, it appeared that at the time of the beginning of the suit there was a necessary party who had not been made a party to the suit, but when the objection was made it was shown that the party thus omitted was dead, and it was held that the suit would not be dismissed on account of the original omission.

Where a plaintiff has, at the time of the beginning of his suit, a cause of action, but which cannot be enforced by him because of some intervening obstacle, which may be removed without impairing any substantial right of the defendant, and such obstacle is removed after the suit is brought, then that fact may be shown on the trial; and the defendant cannot allege error where he has sustained no injury.

In the case of *Hoagland v. Van Etten, 36 N. W. R. (Neb), 755*, a suit having been brought by an assignee who was not the real party in interest, it was held that, though he had under the code no right of action, yet he might purchase the interest of his assignor and proceed with his suit.

In *Coulter v. Haynes, 146 Mass., 458*, the plaintiff, having brought suit after the assignment by him of the instrument sued on, the assignment was pleaded as a defense. Upon that the assignee appeared in court and consented to the maintenance of the suit. The court said:

"If any authority from the assignee was necessary to enable the plaintiff to maintain the action, the appearance of the assignee in court, and his statement that he did not desire,

through his assignment, to prevent the recovery in this action, ratified the bringing of the suit, and was a sufficient authority to the plaintiff to prosecute the action."

See, also—

Moore v. Spiegel, 143 id., 413.

In the case of *Humphreys v. Humphreys, 3 P. Williams, 349,* a demurrer had been sustained to the bill because the plaintiff, who claimed in the right of her deceased father, had not sued as administratrix of his estate. In point of fact no administrator had ever been appointed. A demurrer was sustained to the bill on the ground that she showed no cause of action, though she might have had ultimate rights in the controversy as heir and distributee. After the demurrer was allowed, she took out letters of administration, and offered to set that fact up by way of amendment.

It was objected that if the amendment was allowed, the bill "would appear to be filed before the administration taken out, and before the right to sue commenced."

This, we are told by the reporter, Lord Chancellor Talbot "with great clearness, and not without some warmth in respect of the delay, overruled." That was in the year of our Lord 1734.

This case was followed in *Swatzell v. Arnold, Woolw., 384.* The suit in that case was brought in Nebraska by one who had qualified as administrator of a deceased person in Kansas, and who sued in that capacity; but as it appeared that a foreign administrator could not sue in Nebraska, a demurrer was sustained to the bill. A month later the plaintiff offered to amend his bill by showing that in the meantime, and after the bring-

ing of the suit, the plaintiff had also taken out letters in Nebraska. The court, Mr. Justice Miller presiding, held that the amendment was a proper one; holding that at the time of the beginning of the suit the plaintiff had an interest in the subject matter, though he had no standing in court; and that for that reason he might support his suit in order to defend his right by authority afterwards acquired.

To the same effect, see *Bradford v. Felder, 2 McCord, Chy., S. C., 170.*

Undoubtedly by the law merchant, the holder of a bill or note indorsed in blank, derives title through the implied assignment; he having the right by delegation to write the assignment over the name of the indorser. Until that is done the legal title cannot be said to be fully vested in him; but he may write the assignment above the name of the indorser after the suit has been brought, and on the trial of the cause at the time of offering the instrument in evidence.

Cope v. Daniel, 9 Dana, 417.

Edwards v. Scull, 11 Ark., 325.

2 Rand. Comm. Paper, sec. 710.

It is true that many of the cases cited above were chancery cases; but it is also true that they were decided at a time when the rules of practice were applied with far more strictness in the equity courts than they are now in the law courts wherever the code practice prevails. It is also true that the code practice has in effect adopted the general rules of chancery practice, as they existed at the time of its adoption, with such modifications as might tend to a more liberal and a speedier administration of justice.

After all, the rules of practice as to parties are not sacramental. They are only designed for the purpose of giving to every one interested an opportunity of being heard before his rights are affected by an adjudication. The rules will always be relaxed where their strict application would lead to no valuable result. They should be left largely to the discretion of trial courts.

Foster Fed. Pr., sec. 59.

The main objection of the plaintiff in error to the proof of the release seems to be that it was not based on a supplemental complaint such as is authorized by the code. *Brief., p. 53.* But the objection to the release was not put on that ground; and if it had been it could have been removed in a few minutes by filing the supplemental complaint, the absence of which is now complained of. The whole contention resolves itself into a mere technical point which requires a microscope of pre-historic construction to enable any one to discover.

As to the claim that the plaintiffs could not maintain the suit because they were foreign insurance companies doing business in Arkansas.

Counsel for plaintiff in error copy in their brief the statute of 1887, relating to foreign corporations.

But prior to that time, a counterpart of that act, specially applying to insurance companies, had been passed, the same being as follows:

"It shall be unlawful for any person, company or corporation to negotiate or solicit within this State any contract of insurance, or insurances, or pretend to effect the same, or to re-

ceive and transmit any offer or offers of insurance, or receive or deliver any policy or policies of insurance, or in any manner aid in the transaction of the business of insurance, without complying fully with the provisions of this act."

Mansf. Dig., sec. 3827.

"No person shall act as agent or solicitor in this State of any insurance company of another State or foreign government, in any matter whatever relating to risks, until the provisions of this act shall have been complied with on the part of the company or association, and there has been granted to said company or association by the Auditor a certificate of authority showing that the company or association is authorized to transact business in this State."

Id., sec. 3831.

"No insurance company, not of this State, nor its agents, shall do business in this State until it has filed with the Auditor of this State a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company, served on the Auditor or the party designated by him, or the agent specified by said company to receive service of process for said company, shall have the same effect as if served personally on the company within this State. And if such company should cease to maintain such agent in this State, so designated, such process thereafter may be served on the Auditor; but so long as any liability of the stipulating company to any resident of this State continues, such stipulation cannot be revoked or modified, except that a new one may be substituted, so as to require or dispense with service at the office of said company within this State, and that such service, according to this stipulation, shall be sufficient personal service on the company. The term 'process' includes any writ, summons, subpœna, or order whereby any action, suit or proceedings shall be commenced, or which shall be issued in or upon any action, suit or proceeding."

Id., sec. 3834.

By reference to that compilation it will be seen that these sections are a part of a series of statutes relating to insurance companies, forming a code in itself, establishing an "insurance bureau," and governing matters of insurance generally. The

sections above quoted had the same effect as to insurance companies that the later act had upon other foreign corporations. They differ in respect of the particular that in the case of foreign insurance companies the stipulution should be filed in the office of the Auditor, while in the case of other foreign corporations it was to be filed in the office of the Secretary of State. By reference to the chapter in Mansfield's Digest entitled Insurance Bureau, p. 780 *et seq.*, it will be seen that the entire connection of the State with insurance companies exists through the medium of the Auditor. It is to the Auditor's office that any one would naturally go to make any inquiry as to an insurance company.

Support to our contention is drawn from the fact that during the same session of the Legislature that passed this act as to foreign corporations, that is, on March 26, 1887, the General Assembly passed an act which contains the following sections relating only to insurance companies:

"Sec. 3. Before any corporation or company organized under the laws of any other State shall be permitted to do business in this State, they shall in addition to filing the bond required in section 1 of this act, be required to file with the Auditor of State a statement of the Commissioner of Insurance of the State under whose laws they are organized, as to their condition, responsibility, etc., and if there be no such Commissioner, the Auditor may require said company to exhibit to him a statement of their financial condition, responsibility, etc., and if it appears that said company is a responsible company, said Auditor shall issue a certificate to them, as hereinafter provided.

"Sec. 4. When any insurance company shall have complied with all the provisions of this act, it shall be the duty of the Auditor of State to issue to said company a certificate to that effect, which shall entitle them to do business in this State, and if any person shall attempt to solicit or transact any business for and in the name of any such company, which

company has not complied in all respects with the requirements of this act, he shall be guilty of a misdemeanor, and shall be fined in any sum not exceeding five hundred dollars, and the burden of proving that said company has complied with the provisions of this law shall be on the defendant."

Acts of Arkansas, 1887, p. 123.

The whole act is a recognition of the pre-existing system, which, as the court said in the Marine Insurance Company case, had been in force for several years and had been found to be satisfactory.

The acts passed in the same session are to be construed *in pari materia*; and as implied repeals are not favored, the present case is not affected by the act of 1887, relating to foreign corporations. Unless the statutes are so repugnant as to be positively irreconcilable, they must both stand.

McCool v. Smith, 1 Black, 459.

U. S. v. Walker, 22 How., 299.

Galena v. Amy, 5 Wall, 705.

Henderson's Tobacco, 11 id., 652.

Arthur v. Homer, 96 U. S., 137.

Chew Heong v. U. S., 112 id., 536.

Manifestly no such repugnancy exists in the present case.

It is moreover a rule of construction that general laws do not repeal special ones. Lord Hardwick said:

"Subsequent acts of Parliament in the affirmative, giving new penalties, and instituting new methods of proceeding, do not repeal former methods and penalties of proceeding ordained by preceding acts of Parliament, without negative words."

Broom Leg. Max., 25.

As to the release.

This matter has already been incidentally discussed.

The chief objection seems to be that it was executed after the suit was begun. If counsel had explained in what respect their client would have been better off if it had been executed before the suit was begun we could understand the argument better.

As to the contention that the release was a bar to the action, it may be said that it has at least the merit of novelty. The release did not purport to affect any interest of the insurers, nor could the releasors have conveyed rights that belonged to others. This singular contention on the part of the plaintiffs in error is void of support in reason, principle or authority. Besides, no such point was made in the court below.

As to the negligence of the defendant.

The defendant tried to cloud the consideration of the case in the minds of the jury by metphysical discussions as to proximate and remote causes; but no such questions were involved.

The argument for the plaintiff in error adroitly omits the consideration of the fact that the station at the foot of Main street was the general receiving station of the defendant in the City of Little Rock. The evidence showed that only fifty bales were shipped at any other station of the defendant company in the city, and that this was a station where a very large amount of cotton was shipped annually. We mean that only

fifty bales were shipped elsewhere in the city by choice; but there were also 800 or 900 bales sent off from the station at the foot of Main street, because the defendant would not furnish cars to transport it. See testimony of Smith, pp. 72, 73.

The evidence, without conflict, showed that the defendant had the only line of railway running from the foot of Main street to the compress in Argenta; that it made a contract with the Compress Company to transport all cotton received to the compress in Argenta at the price of $2 per load; that the defendant was to send the cars as they were needed; that it was called on by the Compress Company to furnish cars to remove the arriving cotton; that it failed to do so; that cotton lay at the foot of Main street, much of it under bills of lading, during very dry weather, for from seven to twenty days, when the fire took place, burning from 3500 to 4000 bales in and around the sheds of the Compress Company and in the street, of which cotton bills of lading had been given by the defendant for more than 1400 bales.

Counsel insist that the station of the railway company at the foot of Main street was not a receiving station, but no reason for arriving at such a conclusion is suggested. It was a place where everyone took his cotton for shipment if he wished to do so. As virtually all cotton is compressed in the present day before shipment to market, the incidental compression of cotton on the way, did not in any manner affect the fact that the station was not only a station of the defendant, but a general station.

The number of bales that were received there within a

short period, shows that it was not only a receiving station, but that it was a receiving station for a very large amount of cotton.

This was then practically the only shipping station for cotton in the city that defendant had at that time. It had agreed with the Compress Company that it would ship all cotton that should be received there to the compress in Argenta. The contract was in full force and unrescinded up to the time that the fire occurred. This was simply a shipping contract, made by a common carrier in the ordinary course of business. The fact that the Compress Company expected to compress the cotton after it was delivered in Argenta, cuts no figure in the case. If the compress had been situated in St. Louis or New York, or if the ultimate disposition of the cotton had been to have it twisted into ropes, or woven into cloth, the legal aspect of the case would not have been changed. The contract would still have been one for the transportation of the cotton to some other place; and the fact that it was there to undergo some physical change would not affect the contract for transportation. Counsel seem to argue that the Union Compress Company was simply the bailee of the owners, and that the cotton was left at the foot of Main street for compression; but that statement is grossly inaccurate. The cotton was not left there for compression, but for transportation to a place where it could be compressed. If the defendant had performed its contract, and had carried it to the compress in Argenta, and had there delivered it for compression, after that the Compress Company would have held the cotton as bailee of the defendant; but until that time the latter held all cotton received as the receiving agent of the defendant, a common

carrier, whose business it was to transport such commodities from place to place. This is so with regard to all the cotton, whether billed or unbilled; for the contract between the defendant and the Compress Company embraced all cotton that might be brought to the sheds of the latter, consigned provisionally or otherwise to the compress in Argenta. The cotton billed on the Memphis and Little Rock Railroad was destined to the same place for compression, preparatory to shipment to various places of ultimate consignment in Europe and America. If the defendant could say that the sheds at the foot of Main street did not constitute a receiving station, it could, with equal propriety, assert that the compress in Argenta did not constitute a discharging station; and yet thousands and thousands of bales of cotton were received at one station and discharged at the other; and this course of business seems to have been a permanent arrangement.

It is true that the Compress Company, acting as agent of defendant, did not issue bills of lading for cotton thus transported; but that was because bills were issued by another agent to the owners for the transit from Little Rock to Argenta, and beyond; and as between the Compress Company and defendant the standing agreement was the equivalent of a bill of lading. Moreover, the Compress Company was paid for performing what service it did perform for the defendant in and about the transportation of the cotton. It was to load the cars for the defendant. Necessarily it could not load the cotton without receiving it. As the contract covered the entire operation of receiving, loading and transportation, the consideration agreed on must be regarded as having relation to every part of the service performed and received.

Let us suppose that any one else else than the Compress Company had performed the same duties at the sheds that it performed, can any one doubt but that in receiving, keeping and loading the cotton it was the agent of the Railway Company? The argument for the appellee would seem to be that the Compress Company was keeping the cotton on its own account. On what account? It was simply keeping it for defendant, who could call for it any hour. Having neglected to call for it and take it away, can the appellee now say that the keeping of the cotton was a thing that it had nothing to do with? That would be simply to say that appellee could establish a public agency, derive all the benefits flowing from that relation, and avoid all of its attendant responsibility. If the appellee could do that in this case, it can in the same way, by a system of delegation, avoid any responsibility in the matter of keeping and storing freights at every station on its line for all time to come.

The only difference between this station at the foot of Main street and other stations of the appellee was that here nothing was shipped but cotton. Special stations of that kind, for the reception of coal, or some other single commodity, are common on most railways. The rule of the law as to the degree of care to be exercised by the carrier in such cases is only varied by the nature of the commodity. In the case of a station for the receipt of marble or granite, extraordinary precautions against fire would not be required. Where the receiving station is for the shipping of cotton or coal oil a higher degree of care will be exacted.

The public have a most important concern in the manner in which these stations are kept.

Counsel for plaintiff in error say that it was the fault of the Compress Company that the cotton was allowed to accumulate in the sheds, and that it was not better guarded against fire; yet the cotton would not have accumulated if the defendant had performed its duty.

In *Little Rock R. Co. v. Dick, 52 Ark., 402*, the Railway Company had suffered cotton seed to accumulate near its track. Plaintiff's bull being attracted thither by the cotton seed was killed by a passing train. It was held that the Railway Company was liable.

Yet, according to the contention of the appellee, it could allow cotton to accumulate at a station indefinitely, and burn up a city in that way, and yet not be held to any responsibility.

In *Jones v. Nichols, 46 Ark., 207*, the defendant dug a pit near a public road, and left it uninclosed, with corn and cotton seed scattered about it. The plaintiff's cow fell into the pit and was killed; and it was held that defendant was liable.

"The blasting of rocks by the use of gunpowder or other explosive in the vicinity of another's dwelling house, or in the vicinity of a highway is a nuisance, and the person doing the act, or causing it to be done, is liable for all injuries that result therefrom. So the keeping of gunpowder, nitro-glycerine, damp jute or other explosive substances in large quantities in the vicinity of one's dwelling house, or place of business, is a nuisance *per se*, and may be abated as such by action at law, or by injunction from a court of equity; and, if actual injury results therefrom the person keeping them is liable therefor, though the act occasioning the explosion is due to other persons, and is not chargeable, to his personal negligence."

Wood on Nuisances, sec. 142.

A railway company storing explosives in a depot building

having a defective chimney flue, by reason whereof the building takes fire, and there is an explosion, injuring the plaintiff's neighboring property, is liable for the injury.

South Park R. Co. v. Conway, 8 Col., 1.

S. C., 54 Am. Rep., 537.

One who wantonly or negligently causes property to be exposed to dangers which he knew, or with ordinary forecast and prudence might have known, is responsible for damages resulting therefrom, though his act may not have been the most proximate cause.

Scott v. Hanter, 46 Penn. St., 192.

The creator of a nuisance, or one who more remotely, either by negligence or design, furnishes means and facilities for the commission of any injury to another, which could not have been done without them, is equally responsible with the wrong-doer.

Anderson v. Dickie, 26 How. Pr., 105.

Parties who cause a nuisance on the lands of a stranger are liable for its continuance, and it is no defence that they cannot lawfully enter to abate it.

Smith v. Elliott, 9 Pa. St., 345.

Case lies against all who are jointly concerned in the continuance of a nuisance; whether lessees, sub-lessees, or assignee of lessor.

Rogers v. Stewart, 5 Vt., 215.

The declaration stated that the defendant wrongfully caused to be kept and continued large quantities of dirt and rubbish

wrongfully placed upon a public highway near the wall; by means whereof the plaintiff passing along the highway was induced and caused to walk over the rubbish and to fall into the canal; held that the declaration was good.

Goldthorpe v. Hardman, 2 Dowling & Lowndes, 442.

Where defendants as persons of ordinary prudence ought to have known of the danger, and persisted in maintaining an obstruction, they are responsible.

Scott v. Hunter, 46 Penn. St., 192.

Lake v. Milliken, 62 Me., 240.

The careless or negligent keeping of gunpowder in large quantities near dwelling houses, or when the lives of persons are thereby endangered, is a nuisance at common law.

Braaley v. People, 56 Barb., 72.

Counsel for plaintiff in error seem to think that the liability should fall on the Compress Company. It may be that that company would also be liable; but the primary fault was committed by the Railway Company; for demonstrably, if it had transported the cotton as it had agreed to do, the loss could not have occurred.

However that may be, the assumed liability of the Compress Company is irrelevant to the inquiry as to that of the Railway Company.

Where an injury is the result of two concurring causes, the party responsible for one of these causes is not exempt from liability because the person who is responsible for the other cause may be equally culpable.

Lake v. Milliken, 62 Me., 240.

The comparative degrees in the culpability of two will not affect the liability of either. If both were negligent in a manner contributing to the result, they are liable jointly or severally.

Barrett v. R. R. Co., 45 N. Y., 628.

Where the negligence of two or more persons combines to occasion a loss to a third person they are both liable for the damage sustained.

Slater v. Mersereau, 64 N. Y., 138.

Where a landlord has a sidewalk that is out of repair and he lease it with a covenant on the part of the tenant to keep in repair, and after that the plaintiff is injured by reason of a defect in the sidewalk, the landlord, the tenant and the city are all liable for the injury.

Davenport v. Ruckman, 37 N. Y., 568.

The declaration stated that the defendant wrongfully caused to be kept and continued large quantities of dirt and rubbish, wrongfully placed upon a public highway near the wall; by means whereof the plaintiff passing along the highway was induced and caused to walk over the rubbish and to fall into the canal. Held, that the declaration was good.

Goldthorpe v. Hardman, 2 Dowling & Lowndes, 442.

A let a field to B for the purpose of being worked as a lime quarry. The ordinary way of getting limestone was by means of blasting, and A authorized quarrying of stone and the erection of a lime kiln in the field. A nuisance was caused to the adjoining occupier by the blasting and by the smoke from the kiln, and he brought an action against A and B.

Held, that A, the land-owner, was liable, although the nuisance was actually created by the act of the tenant, because the terms of the demise were an authority from him to B to create the nuisance, which was therefore the necessary consequence of the mode of occupation contemplated in the demise.

James v. Harris, 45 L. J., 2 B., 545.

3 L. T., 240.

Any one contributing to a nuisance is liable for any loss naturally growing out of it.

Wood Nuis., secs. 821–2.

And whoever maintains a nuisance is as guilty as he that creates it.

Wasmer v. Delaware R. Co., 80 N. Y., 212.

Brown v. Cayuga Co., 12 id., 487.

Beckley v. Skroh, 19 Mo. App., 95.

Where defendants as persons of ordinary prudence ought to have known of the danger, and persisted in maintaining an obstruction, they are responsible.

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The comparative degrees in the culpability of two will not affect the liability of either. If both were negligent in a manner contributing to the result, they are liable jointly or severally:

Barrett v. R. R. Co., 45 N. Y., 628.

A contractor entered into a contract to take down a house for trustees, the work "to be done carefully under the direction and subject to the approval of the trustees: Held, that the trustees were liable for injuries occasioned to a third person by the negligence of the contractor or his servants.

Linnehan v. Rollins, 137 Mass., 123.

One who buys land knowing that there is a nuisance on it, and afterwards receives rent from the tenant in possession, is liable for it.

Pierce v. German Savings Assn., 13 Pac. R., 478 (Cal.).

A nuisance was created by a lessee under a lease, by which he had covenanted to keep the premises in repair. The nuisance became injurious to a third person. Subsequently, and on the expiration of the lease, it was renewed with like covenants, the landlord not taking actual possession, but knowing of the injury: Held, that the landlord was liable for the injury.

Ingrersen v. Rankin, 47 N. J. Law, 18; S. C., 54 Am. R., 109.

Where a tenant covenants to repair, the landlord cannot be sued for damages caused by a defective covering for a cellar, though the defect existed when the lease was made.

Pretty v. Bickmore, 6 Eng. R. (Moak's Notes), 182.

If the owner of land erect a building which is a nuisance, or which the occupation is like to produce a nuisance, and let the land, he is liable to an indictment for such nuisance being continued or created during the term. So is he if he lets a building which requires particular care to prevent the occupation from being a nuisance, and the nuisance occur for want of such care on the part of the tenant.

King v. Pedley, 1 Ad. and E., 822.

Wood Nuis., sec. 142.

McAndrews v. Collard, 13 Vroom, 189.

Henry v. Dennis, 93 Ind., 452.

Scott v. Hunter, 46 Penn. St., 192.

Upon the question as to whether an act constituted a nuisance, it is unnecessary to inquire into the intent of the party doing the act. The best intention cannot prevent an act from being a nuisance where it otherwise is such, and the worst intention cannot make an act a nuisance where it otherwise is not.

Bonell v. Smith, 53 Iowa, 282.

The creator of a nuisance or one who more remotely, either by maintenance or design, furnishes the means and facility for the commission of any injury to another, which could not have been done without them, is equally responsible with the immediate wrong-doer.

Anderson v. Dickie, 26 How. Pr., 117.

The liability of one who, without authority, makes an excavation in a highway, is not discharged or affected by the fact that, having provided a sufficient covering thereto, it was

destroyed by the act of a wrong-doer. He is bound, at his peril, to keep it so covered that the highway is as safe as before.

Congrere v. Morgan, 18 N. Y., 84.

Dygert v. Schenck, 23 Wend., 446.

Vandenburgh v. Truax, 4 Denio, 464.

Bizzell v. Booker, 16 Ark., 217.

The fact that the act of a third person may have contributed to the final catastrophe will not exonerate a defendant sued for injuries resulting from an act that is unlawful, or is so hazardous as to be in the nature of a nuisance on account of the occasion for accident and injury which it continually presents to innocent persons.

Barry v. Terkildson (Cal.), 1 Am. St. Rep., 55.

As was said in *Tilley v. San Francisco R. Co. 49 Ark., 542,* "a railway company is bound to keep its track and contiguous land free from inflammable matter." And it is said: "If the negligence of the defendant was the proper cause of the injury to the plaintiffs it was of no consequence whether it was of omission or commission."

Harriman v. Pittsburg R. Co. (Ohio Sup. Ct.), 32 Am. and Eng. R. Cases, 38.

A party in whose possession and control a railway is placed with power to continue its use, is equally liable with the original owner for a nuisance arising from the manner of its construction.

Tate v. Missouri R. Co., 64 Mo., 149.

The creator of a nuisance, or one who more remotely, either by negligence or design, furnishes means and facilities for the commission of any injury to another which could not have been done without them, is equally responsible with the wrong-doer.

Anderson v. Dickie, 26 How. Pr., 105.

Counsel for plaintiff in error say :

"The proximate cause was *the carelessness of the boys*, with their cigarettes and matches." (*Brief p. 64.*)

The italics, *in articulo mortis*, are not ours. According to this ingenious theory a railway company may pile cotton or gunpowder in the street of a city a mile high, and if boys light them with cigarettes the boys alone are responsible. The suggestion is worthy of the best days of American humor; but it ought not seriously to affect the judicial mind. In this case cotton of about the value of $200,000 was destroyed. It is doubtful whether recourse on the unknown boy smoking a cigarette would be quite adequate. It might be objected by the boys that there is nothing to prevent any one from smoking in the streets.

But in respect of one creating, or helping to create, or continuing or helping to continue a nuisance, no question of negligence can arise. Those making and continuing a public nuisance are bound at their peril to keep the highway in which the nuisance is situated as safe as if the nuisance was not there, and neither the fact that they had no notice of the condition of the nuisance, or the fact that they were under no obligation to repair, will relieve them of their liability.

Ivins v. Wood, 4 Robertson, 142.

The cotton was fired in a public street, where it had no business to be.

Where one creates a nuisance he is liable for any damage caused thereby, though the immediate cause may have been the negligence of another person.

Meyers v. Malcolm, 6 Hill, 292.

2 Thomp. Neg., 1087.

Salisbnry v. Hashenroder, 106 Mass., 458.

Wood Nuis., sec. 142.

McAndrews v. Collerd, 13 Vroom, 189.

Henry v. Dennis, 93 Ind., 452.

Scott v. Hunter, 46 Penn. St., 192.

As held by Judge Caldwell, and shown by the uncontradicted evidence in this case, the Compress Company held the cotton as the agent of the defendant; and the latter was responsible for all acts of negligence committed by its agent as such. *Respondeat superior.*

Mechem Agency, sec. 734.

Broom Leg. Max., 668.

The possession of the agent was the possession of the principal.

McNeill v. Arnold, 17 Ark., 155.

Ordinarily the cases on this subject present the feature of negligence on the part of the agent unknown and unsanctioned by the principal. In such cases the principal and the

third person injured are, morally speaking, equally innocent, and the law fixes liability on the former because he had the selection of the agent. Such is not the case here. As for the fault of not removing the cotton promptly from its dangerous locality, the defendant was solely to blame. As to the manner in which the cotton was kept while it was waiting for transportation, the want of protection against the ever-impending danger of fire, its continuous and reckless exposure, the defendant was as guilty as its agent. Being a corporation it could only act through agents, and it was as much bound for what was done by the Compress Company within the scope of its authority as it was for what was done by its conductors, train dispatchers and engine drivers within the scope of theirs. Moreover, this thing was not done in a corner. Many times a day trains and engines of the defendant went by this magazine of combustibles, so that its other officers and employes undeniably had knowledge of the actual situation; demand for engines and cars had also been made, and as they acquiesced in what was done, the defendant, on every ground of expediency, reason and law must be taken as sanctioning and approving all that was done. Or if the defendant did not mean to accept the risk, why was not the cotton removed, or safeguards applied commensurate with the danger?

Not only is it true on the facts presented that the defendant was liable for the care with which the cotton was kept during its quarantine; but it is also true that by no kind of agreement or arrangement between it and the Compress Company, could that liability be evaded or restricted.

Whart. Neg., sec. 180.

Water Co. v. Ware, 16 Wall., 575.

If it were assumed that it was negligence in the Compress Company to let the cotton accumulate as it did, and to cause it to be piled in a public street, the result was confessedly, and by all the authorities, a nuisance "of a very alarming character." What, then, was the duty of the Compress Company, supposing it to have suddenly become aware of the danger that had been incurred by its improper conduct? Clearly there could not have been any building erected on the spot within a reasonable time for the safe storage of the cotton. The only practical remedy, easy, prompt and inexpensive, was to remove it from a place where it was exposed momently to dangers seen and unseen.

Now the Compress Company had a standing contract with the defendant to do this very thing. Supposing that the owners of the cotton had sued that company for the loss of their cotton, no possible doubt can exist, according to law and the theory of the defense in this case, but that the latter would have been held liable. It is not possible to conceive of any defense which the Compress Company could make that would stay the wheels of justice. But if the Compress Company were damaged by reason of the failure of the Railway Company to remove the cotton as it agreed to do, it would undoubtedly have a right of action on its contract.

In the present case, the plaintiffs are entitled to the same right of action against the defendant that the Compress Company would have had in the case mentioned. Concerning this proposition, no shadow of doubt exists, as a brief glance at the authorities will show.

In *Water Co. v. Ware, ubi sup.*, the City of St. Paul em-

ployed the St. Paul Water Company to lay water pipes in the streets of the city, the Water Company agreeing with the city to "become responsible for all damages which might occur by reason of the neglect of the employes in the premises." While the work was going on, the plaintiff, Ware, while driving on the street, was much injured by reason of his horse taking fright at a steam drill employed in laying the pipes by one Gilfillan, who had contracted with the Water Company to do the work as a sub-contractor. The defense of course, was, that Gilfillan was an independent contractor, and that Ware was not liable for anything done by him or his employes or servants. It was held, however, that as the Water Company had contracted to protect the city, and be responsible for all damages that might be incurred during the progress of the work, suit might be brought against it by the plaintiff in order to prevent circuity of action.

It might be suggested that the fact that the contract in the Ware case was one in the nature of an indemnity would distinguish it from the case now before the court. But the agreement of the defendant with the Compress Company that the former would remove the cotton as received was, in fact, more than a contract of indemnity; for if the contract had been faithfully kept, no damages could have been incurred; and exemption is better than indemnity in the same degree that an ounce of prevention is worth a pound of cure. But the principle is of much wider application.

In the case of *Inhabitants of Milford v. Holbrook, 9 Allen, 21*, the plaintiff had brought the suit against the defendant, who was a landlord, for an injury caused by the falling of an awning put up by his tenant. It was conceded that the tenant

and not the landlord was the person liable under ordinary circumstances; but to this it was replied that the landlord had agreed with the tenant to keep the premises in repair: The court said: "The rule is that the occupier and not the landlord is bound, as between himself and the public, so far to keep the buildings in repair that they may be safe to the public; but if the landlord is bound by express agreement with the tenant to repair, the party injured by a defect or want of repair may have his action against the landlord in the first instance, to avoid circuity of action."

In that case also the court said that the landlord was not in *pari delicto* with the tenant, because the landlord had made it his duty to make the needed repairs; and this view fully sustains the holding of Judge Caldwell in this case that the Railway Company was the party primarily at fault, for if it had removed the cotton as it arrived the loss certainly never would have occurred.

The same doctrine as to the right of a person injured to avail himself of a contract to avoid circuity of action was previously stated, upon the authority of the English cases, by C. J. Shaw, in *Bean v. Green, 4 Cush., 278.*

That the defendant and Compress Company are not in *pari delicto*, see also

Woburn v. Boston, 109 Mass., 283.

It may be said that the plaintiff did not sue on the contract, as no contract is alleged in the complaint. That objection is futile. Such distinctions are abolished by the code. It is only necessary for the plaintiff to state a cause of action. We believe also that even at the common law the action would be

on the case. The cases cited from Massachusetts were actions of tort; and we think that the case of *Ware v. Water Co.* was also, though the matter does not clearly appear from the report.

To that case we must return, for it casts another side light on the questions involved in the present controversy.

We have said that this case differs from most cases involving the liability of a principal for the negligence of an agent, since usually the principal is either ignorant of the negligence of his agent, or feigns to be ignorant. The defendant in this case knew of everything that was going on. It had been called on for cars to remove the cotton, and had declined to furnish them, saying that it was short of them.

The defendant then assented to what was done in a double sense: First, as assenting presumptively to all that was done by its agent within the scope of the authority given, and, secondly, by actual assent to every act that was known and not then openly dissented from. Even if the Compress Company had not been an express agent at all the defendant would have been bound by its acts, of which it had actual knowledge.

Wood, Master and Servant, sec. 306 and note.

Id., sec. 305.

Now in Water Co. v. Ware, the court say: "Common justice requires the enforement of that rule (the rule fixing the responsibility of the employer) as if the contractor does the thing which he is employed to do the employer is as responsible for the thing as if he had done it himself; but if the act which is the subject of complaint is purely collateral to the matter contracted to be done, and arises indirectly in the per-

formance of the work, the employer is not liable, because he never authorized the work to be done. 'It would be monstrous,' said Lord Campbell, 'if a party causing another to do a thing were exempted from liability for the act merely because there was a contract between him and the person immediately causing the act to be done;' which may be accepted as correct if applied in a case where the work contracted to be done will necessarily in its progress render the street unsafe and inconvenient for public travel. More than one party may be liable in such a case; nor can one who employs another to make such an excavation relieve himself from liability for such damages as those involved in the case before the court by any stipulation with his employe, as both the person who procured the nuisance to be made and the immediate author of it are liable."

The present case is one, however, in which the defendant not only authorized the reception of the cotton at the place where it was received, and by the agent who did receive it, with the necessary duty of looking after it and storing it until it could be shipped, but it was aware of all that was done by its agent, and never at any time objected to anything that was done, and does not now say that the agent departed from its instructions.

Counsel say that the effect of the act of the Legislature of March 15, 1887, is not to change the rights or position of carriers save as to the holders of their bills of lading. As the solution of that question must depend on the language of the act itself, we here quote it entire:

"*Be it enacted by the General Assembly of the State of Arkansas:*

"SECTION 1. That no warehouseman, wharfinger or other person shall issue any receipt or voucher for any goods, wares, merchandise, cotton, grain, flour, or other produce or commodity to any person or persons purporting to be the holder or holders, owner or owners thereof, unless such goods, wares, merchandise, cotton, grain, flour or other produce or commodity shall have been actually received into the store or upon the premises of such warehouseman, wharfinger, or other person, and shall be in the store or on the premises aforesaid, and under his control at the time of issuing such receipt.

"SEC. 2. That no warehouseman, wharfinger, or other person, shall issue any receipt or other voucher upon any goods, wares, merchandise, cotton, grain, flour, or other produce or commodity, to any person or persons for any money loaned or other indebtedness, unless such goods, wares, merchandise, cotton, grain, flour, or other produce or commodity shall be, at the time of issuing such receipt, in the custody of such warehouseman, wharfinger or other person, and shall be in store or upon the premises and under his control at the time of issuing such receipt or other voucher as aforesaid.

"SEC. 3. That no warehouseman, wharfinger or other person shall issue any second or duplicate receipt for any goods, wares, merchandise, cotton, grain, flour, or other produce or commodity, while any former receipt for such goods, wares, merchandise, cotton, grain, flour or other produce or commodity, as aforesaid, or any part thereof, shall be outstanding and uncancelled, without writing across the face of the same 'Duplicate.'

"SEC 4. That no warehouseman, wharfinger or other person shall sell or incumber, ship or transfer, or in any manner remove, or permit to be shipped, transferred or removed beyond his control, any such goods, wares, merchandise, cotton, grain, flour, or other produce or commodity, for which a receipt shall have been given by him, as aforesaid, whether received for storing, shipping, grinding, manufacturing or other purpose, without the written assent of the person or persons holding such receipt.

"SEC. 5. That no master, owner or agent of any boat or vessel of any description, forwarder, or officer or agent of any railroad, transfer, or transportation company, or other person,

shall sign or give away any bill of lading, receipt or other voucher or document for any merchandise or property by which it shall appear that such merchandise or property has been shipped on board of any boat, vessel, railroad car, or other vehicle, unless the same shall have been actually shipped and put on board, and shall be at the time actually on board, or delivered to such boat vessel, or other vehicle, or to the owner or owners thereof, or his or their agent or agents, to be carried and conveyed as expressed in such bill of lading, receipt or other voucher or document.

"SEC. 6. That all receipts issued or given by any warehouseman, wharfinger, or other person or firm, and all bills of lading, transportation receipts and contracts of affreightment issued or given by any person, boat, railroad, transportation or transfer company, for goods, wares, merchandise, cotton, grain, flour or other produce or commodity, shall be and are hereby made negotiable by written endorsement thereon, and delivery in the same manner as bills of exchange and promissory notes; and no printed or written conditions, clauses or provisions, inserted in or attached to any such receipts, bills of lading or contracts, shall in any way limit the negotiability, or affect any negotiation thereof, nor in any manner impair the rights and duties of the parties thereto or persons interested therein; and every such condition, clause or provision purporting to limit or affect the rights, duties or liabilities created or declared in this act, shall be void and of no force or effect.

"SEC. 7. That warehouse receipts given by any warehouseman, wharfinger, or any other person or firm for any goods, wares, merchandise, cotton, grain, flour or other produce or commodity, stored or deposited, and all bills of lading and transportation receipts of every kind given by any carrier, boat, vessel, railroad, transportation or transfer company, may be transferred by endorsement in writing thereon, and the delivery thereof so endorsed, and any and all persons to whom the same may be transferred shall be deemed and held to be the owner of such goods, wares, merchandise, cotton, grain, flour or other produce or commodity, so far as to give validity to any pledge, lien or transfer given, made or created thereby, as on the faith thereof, and no property so stored or deposited, as specified in such bills of lading or receipts shall be delivered except on surrender and cancellation of such receipts and bills of lading: Provided, however, that all such receipts and bills of lading which shall have the words 'not negotiable' plainly written or stamped on the face thereof, shall be exempt from the provisions of this act.

"SEC. 8. That any warehouseman, wharfinger, forwarder or other person who shall violate any of the provisions of this act, shall be deemed guilty of a criminal offense, and upon indictment and conviction shall be fined in any sum not exceeding five thousand dollars, or imprisoned in the penitentiary of this State not exceeding five years, or both. And all and every person or persons aggrieved by the violation of any of the provisions of this act may have and maintain an action at law against the person or persons, corporation or corporations violating any of the provisions of this act, to recover all damages which he or they may have sustained by reason of any such violation as aforesaid, before any court of competent jurisdiction, whether such person or persons shall have been convicted of fraud as aforesaid under this act or not.

"SEC. 9. All the provisions of this act shall apply to bills of lading, and to all persons or corporations, their agents or servants, that may issue bills of lading of any kind or description, the same as if the words 'forwarder' and 'bills of lading' were mentioned in every section of said act.

"SEC. 10. So much of the preceding sections of this act as forbids the delivery of property except on surrender and cancellation of the original receipt or bill of lading, or the endorsement of such delivery thereon in case of partial delivery, shall not apply to property replevined or removed by operation or law.

"SEC. 11. All laws and parts of laws in conflict with this act be, and the same are hereby repealed, and this act shall take effect and be in force from and after its passage."

"Approved March 15, 1887."

Acts 1887, p. 84.

It is a familiar rule of construction that where the Legislature has made no exception in a statute, the courts can make none. The construction contended for by counsel would seem to render the act nugatory so far as carriers are concerned; for the rights of *bona fide* holders of bills of lading were protected before it was passed. See the opinion of Mr. J. Miller in *McNeil v. Hill, Woolw., 96.*

The act was evidently prepared with great care. By its terms the carrier cannot deny his possession without asserting that it has violated the criminal law of the State; and this it cannot do. *Nemo ex suo delicto melioram suam conditionem facere potest.*

Shippers who deposited cotton with the Compress Company received from it warehouse receipts, which were transferable by custom.

Durr v. Hervey, 44 Ark., 301.

None of the cotton was deposited for sale; but even if it had been, the transfer company under these circumstances would have been simply the agent of the owners of it.

In *Brown v. McGran, 14 Pet., 494,* Mr. J. Story said:

"Wherever a consignment is made to a factor for sale, the consignor has a right, generally, to control the sale thereof according to his own pleasure from time to time, if no advances have been made or liabilities incurred on account thereof; and the factor is bound to obey his orders. This arises from the ordinary relation of principal and agent."

If this is the rule where a consignment is made for sale, it ought certainly to apply with equal force where the consignment is made for shipment, or for mere custody.

Whenever the warehouse receipts were transferred the transferee became the principal in the place of the transferror, with like powers of direction and control. According to the testimony when a holder of any of the cotton wished to ship it he took it to the proper officer of a railway company, and exchanged them for a bill of lading. Of course the railroad company then became the owner of the warehouse receipts upon which the bills were issued, and the cotton in the hands

of the Railway Company was held by the Compress Company as its agent, precisely as it had held it as the agent of all previous holders of the warehouse receipts, severally and successively.

The relation then of principal and agent between the Railway Company and the Compress Company undoubtedly existed from the time that the former acquired the warehouse receipts. As between themselves the Compress Company might be responsible to its principal as for any negligent and improper keeping of the cotton; but as to third persons the principal is liable for all improper acts of the agent performed within the scope of the agency. This seems to be elementary. That the act in question was not intended to lessen the liability of carriers is obvious.

Under the standing contract between the Compress Company and the defendant it was the duty of the latter to take the cotton at its receiving station and transport it across the river, where it would not have endangered the cotton of the plaintiffs. The Compress Company offered no resistance to the removal of the cotton, but urged its removal according to the contract. Under these circumstances it must be plain that the Compress Company in respect of the timely removal of the cotton was simply the passive agent of the defendant; keeping the cotton until called for.

The argument of counsel proceeds upon the theory that the Compress Company did not take proper care to protect the cotton from the risk of fire. Placing the probable number of bales at 2600, all except about 926 had been billed at the time of the fire for several weeks, awaiting cars for transportation

across the river. As to the billed cotton the agent was surely in no default, as it was not expected that the Compress Company should furnish a place for keeping the cotton safely for an indefinite period. The fault was with the defendant in letting the cotton accumulate until it became a nuisance of the worst character.

It however is not a necessary postulate in the case made by us that the relation of principal and agent existed between the parties. It is enough to say that by the joint acts of the parties they created the nuisance by which the loss was caused. Counsel in their brief, say:

"The court goes on and states to the jury: 'The *agreement mentioned in the complaint* between the Union Compress Company and the defendant *is admitted in the answer.*' A plain mistake on this vital point."

By no means. The defendant in the answer, said:

"But it says that it gave the Union Compress Company a certain rate per car load, whereby it agreed to haul off the cotton of the said Compress Company from its compress and warehouses at the foot of Main street and elsewhere in the City of Little Rock, to its compress in Argenta, whenever it should desire to transfer cotton from one place to the other." *Tr.*, 7.

The fact that the answer is contradictory in this as in many other respects does not affect the force of this statement. On this point, moreover, there was not the slightest conflict, or even discrepancy, in the testimony.

It is not possible to distort the charge of the court below from its true meaning. The court placed the liability of the defendant on the obvious ground that it had created and continued a nuisance on the public streets of the city by allowing cotton to accumulate and be piled therein, and by permitting

it so to remain under peculiarly hazardous circumstances until it was destroyed by fire. That such was the fact was shown by the entire evidence without contradiction.

As to the contention that the defendant merely delayed the transportation of the cotton, and is not liable for anything that happened during the period of delay.

It is clear that the case of *Railroad Co. v. Reeves, 10 Wall., 176,* and like cases, have no kind of application. In those cases the destroying floods, storms and lightnings were things that no one could foresee. If the carrier in each case could have foreseen them it would have been his duty to guard against them; but in this case the destruction of the cotton sooner or later by fire, if left in the street, was something inevitable. To say that the carrier was under no obligation to take prudent steps under such circumstances to prevent a loss thus foreseen, is more than any court has ever said, or perhaps ever will, unless it shall come to be the law that a carrier owes no duties to the public, being in that respect unlike all other persons.

Indeed the inapplicability of the cases cited under this head, is distinctly shown in the quotations made from the opinions in the brief of counsel.

Thus, in *Railroad Co. v. Reeves, 10 Wall., 176,* Mr. J. Miller said:

"The court further held that when carriers discover themselves in peril by inevitable accident, the law requires of them ordinary skill and foresight, which it defines to be the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them."

Brief, p. 66.

So, in *Hoadley v. Northern Trans. Co., 115 Mass., 304,* Colt, J., said:

"Applying these rules to the case at bar, it is plain that the destruction of the goods by fire, in the calamity which happened, could not reasonably be anticipated as a consequence of the wrongful detention of them on the wharf. The delay did not destroy the property, and there was no connection between the fire and the detention."

Brief, p. 70.

We do not perceive what comfort the counsel for the plaintiff in error can derive from the consideration of cases of that kind.

As to the extent of the cotton crop of 1887, and its difficulty of transportation.

It is enough to say of this assignment that the claim that the cotton crop turned out to be so great that it could not be got out of the country, or from Little Rock to Argenta, without miraculous agencies, proved on trial to be a false pretense. The defendant introduced a witness, Mr. Hecquemberg, its car agent, for the purpose of proving this extraordinary instance of the fecundity of nature. If any one would know about the unparalleled demand on rolling stock, it would doubtless be the car agent; but he exploded the whole subterfuge. He said:

"Q. When you speak of cars for moving do you have reference to moving it to the market only, or do you also include the moving from Little Rock to Argenta to be compressed?

"A. I have reference particularly to moving the crop of the season. As far as my knowledge is concerned, there was no intimation ever given to my office regarding the cars necessary or required to move cotton from Little Rock to Argenta. We had sufficient cars to move through the country the cotton offered.

"Q. What is the distance from the point in Little Rock where the cotton is received to the compress in Argenta?

"A. I could only state that generally by saying that I don't know what it is; never have been around there; not over three or four miles.

"Q. Supposing it to be a mile or two, how many cars would it take to transport the cotton from Little Rock to Argenta, as it would properly be delivered?

"A. I don't think it would take over ten or twelve cars a day, if the cotton was ready to move, unless—if you will allow me to explain—unless the warehouse was to receive the cotton and hold it at somebody's order or risk, or order of consignment.

"Q. Suppose it was ready for delivery to the Railway Company for transportation?

"A. I don't think the business of Little Rock would require more than fifteen or twenty, and they could be moved over there, be unloaded promptly, and come back again. No demand was made, particularly at that time, to move cotton from Little Rock to Argenta. I see no reason why the cars could not have been furnished without trouble to move the cotton, as I understand the case now, from Main street to Argenta without trouble, provided the compress was ready to move the cotton and unload it." Tr., 100 and 101.

The court below did not tell the jury that it was incumbent on the defendant to disprove the negligence charged; but it gave them to understand that as it contended that its failure to keep its contract was caused by a certain unparalleled state of affairs, it must be held to prove that condition of things.

As to the objection that the insurers knew of the danger to be incurred when they placed their cotton at the sheds at the foot of Main street, whereby they contributed to the negligence by which it was lost.

This claim, as a legal proposition, is utterly unfounded.

"The essence of contributory negligence is a want of ordinary care on the part of the plaintiff, which is a proximate cause of the injury." *Beach Con. Neg., sec. 10.*

"This rule is stated over and over again in the reports, with almost every possible limitation, and in almost every pos-

sible way; as, for example, that if the negligence of both parties be proximately the cause of the injury, or when the plaintiff's negligence only is proximate, while that of the defendant is remote, there can be no recovery, but that when the defendant's negligence is the proximate cause, and that of the plaintiff the remote cause, the plaintiff may have his action. And again, if the negligence of the plaintiff, being only a remote cause, the defendant might have avoided inflicting the injury by the exercise of ordinary care, the action for damages is maintainable." *Id.*

"It is sometimes said to be a rule that a plaintiff may recover, notwithstanding the fact that his own negligence exposed him to the risk of injury, if the defendant, after becoming aware of the plaintiff's danger, failed to use ordinary care to avoid injuring him, or, as Judge Thompson puts it, perhaps a better expression of this rule is that, although the plaintiff has negligently exposed himself or his property to an injury, yet if the defendant, after discovering the exposed situation, inflicts the injury upon him, through a failure to exercise ordinary care, the plaintiff may recover damages." *Id., sec. 18.*

"When the defendant, by his own negligent or wrongful acts, or omissions, throws the plaintiff off his guard, or when the plaintiff acts in a given instance upon a reasonable supposition of safety induced by the defendant, when there is, in reality, danger, to which the plaintiff is exposing himself in a way and to an extent which, but for the defendant's inducement, might be imputed to the plaintiff as negligence sufficient to prevent a recovery, such conduct on the part of the plaintiff, so induced, will not constitute contributary negligence in law, and the defendant will not be heard to say that the plaintiff's conduct under such circumstances is negligent, for the purpose of a defense to the action. The defendant, by his own negligent conduct, which has occasioned the conduct of the plaintiff, is estopped, in a certain sense, from making the defense that the plaintiff's conduct was negligent, or, in other words, he is not to be allowed first to induce the plaintiff to be careless, and then to plead the carelessness as a defense to an action brought against him for the mischief that has been the result. The defendant must not take advantage of his own wrong in such a way as that."

Id., sec. 23.

Whenever the defendant is primarily in fault he cannot allege contributory negligence.

Newson v. N. Y. R. Co., 29 N. Y., 383.

Clayards v. Dethrick, 12 Ad. and E., 439.

Fraler v. Sears Water Co., 12 Cal., 455.

Kellogg v. Chicago R. Co., 26 Wis., 223.

Bowas v. Pioneer Tow Line, 2 Saw., 27.

Beach Con. Neg., secs. 10, 13, 18.

Cook v. Champlain Trans. Co., 1 Denio, 91.

Vaughan v. Taff Vale R. Co., 3 Hurl. and Norm., 743.

Same v. Same, 5 id., 679.

The subject is very fully considered in *Kellogg v. Chicago R. Co.*, above cited.

As to the proposition that the insurers knew of the accumulation of the cotton, and charged an extra premium on that account.

According to the argument of counsel for the plaintiff in error, seeing that the insurers knew that the risk was a hazardous one, and having acted accordingly, the Railway Company was at liberty to prolong and increase that risk as much as it pleased. The same thing has been said also about the owners of the cotton, save that in their case their act is catalogued as contributory negligence. The fact the property was insured did not give the defendant the right to destroy it, though a high premium may have been paid for the risk.

Leaving cotton even in the street, which however was not done in this case, temporarily for loading and transportation, does not create a nuisance, nor is it in any way unlawful; but it was the act of the defendant in suffering it to remain there indefinitely until burnt up, that constituted the nuisance.

As to the objection that witnesses should not have been allowed to testify as to the shortage of cars.

Some of the testimony related to cotton and some to lumber; it all related to freight. The testimony of Mr. Hecquemberg showed that the demand for cars for lumber affected the question of the supply of cars for cotton. Moreover, the defendant introduced testimony of the same kind on the examination of the witness. (Tr., 94.)

During the trial the plaintiff proved by Van Etten and other witnesses that the defendant had been remiss in the two preceding years, 1885 and 1886, in furnishing cars for the transportation of freight accumulating in Little Rock; that remonstrances had been repeatedly made on the subject by interested parties to the officers of the defendant company, and that all such remonstrances had been in vain. The evidence tended simply to show the existence and magnitude of the evil which resulted in the fire that produced the loss complained of. In many cases of a like kind with that now under consideratien, carriers have sought to excuse the blocking of their lines by a sudden and unexpected demand for transportation; and one of the main reliances of defendant in this case was the alleged fact that in the autumn of 1887, the cotton crop matured much earlier than common, causing an unusual demand for means of transportation. (See testimony of Smith for defendant, 71; Fletcher, 73; Bragg, 76.) It was certainly competent therefore to show that in 1885 and 1886, when no such unexpected increase of marketable products was alleged to exist, there had been substantially the same deficiency of means for its transportation, as this testimony would natur-

ally tend to the conclusion that the asserted reason for the failure to transport the cotton accumulating in 1887 was not the true one; but that the result had been brought about by systematic negligence that had become chronic. The extent and culpability of negligence depend so largely on a consciousness of its existence, and a persistent disregard of the rights of others on the part of those charged therewith, that it seems strange that such an objection should have been made. Surely when one is charged with having established a nuisance, evidence tending to show when the supposed nuisance had its origin, and how long it has continued, cannot be considered as impertinent. The law seems to be well settled, that in cases where the gist of the action is negligence on the part of the defendant, evidence of other acts of negligence committed by him of the same character, and at or near the same place, is admissible, though such former acts of negligence are somewhat disconnected from the act or omission upon which the suit is based.

Grand Trunk R. Co. v. Richardson, 91 U. S., 471.

Ward v. Young, 42 Ark., 554.

1 Whart. Ev., sec. 43.

Koontz v. Oregon R. Co., 23 Pac. R., 823.

May on Insurance, sec. 325.

These authorities go far beyond anything contended for by us in this case; for the very negligence complained of in this suit was shown by this testimony to have continued for at least three years. Whenever the crop came in there was always the same deficiency of transportation; and if the deficiency had con-

tinued for twenty years no prescription could have prevented the proof of it.

As to the objection that the court erred in admitting in evidence the ordinance of the City of Little Rock, forbidding the storing of combustible articles in the street, with the proclamation of the Mayor with regard to the enforcement thereof.

The ordinance was entirely within the competency of the City Council. *Mansf. Dig., secs. 751, 760.* It had therefore the force of a law; *1 Dillon Mun. Corp., sec. 308;* and its violation raised a presumption of negligence.

Toledo v. Deacon, 63 Ill., 91.

Wilson v. White, 71 Ga., 506.

Bolt v. Pratt, 33 Minn., 323.

Rand v. Wilder, 19 Ill. App., 395.

The keeping of the cotton on the street for any considerable time was a nuisance, ordinance or no ordinance.

Packet Co. v. Sorrells, 50 Ark., 456.

Matthews v. Pac. Ry. Co., 26 Mo. App., 75.

Correll v. Burlington R. Co., 38 Iowa, 120.

Messenger v. Pate, 42 id., 443.

Houston R. Co. v. Wilson, 60 Texas, 142.

New Orleans R. Co. v. Touline, 59 Miss., 284.

Union Pac. R. Co. v. Rassmussen, 25 Neb., 810.

13 Am. St. R., 527.

The reading of the proclamation of the Mayor went to show that the ordinance had not fallen into disuse. In no possible way could the defendant have been improperly injured by its introduction.

As to the objection that the court erred in refusing to admit in evidence a lease showing that the city had leased the street to a private party under whom defendant claimed.

This question need not detain us long. The city had no authority to lease the streets for private purposes; and hence the lease was void on its face.

McDonald v. City of Newark (*N. J.*), *7 Atlantic R., 855.*

City of Harrisburgh's Appeal (*Penn.*), *10 id., 788.*

2 Dill. Mun. Corp., sec. 660.

Terre Haute Gas Co. v. Teel, 20 Ind., 131.

Sullivan v. Royer, 1 Am. St., R., 53.

Sexton v. Zett, 56 Barb., 119.

McCamus v. Citizens Gas Light Co., 40 id., 380.

Anderson v. Dickie., 26 How. Pr., 105.

The occupation of the street by the Compress Company and the defendant for their common profit was *per se* a nuisance.

Penn. R. Co. v. Angel (*Penn.*), *7 Atlantic R., 432.*

Wendell v. Mayor, 39 Barb., 336.

State v. Harden, 11 S. C., 360.

State v. Berdetta, 73 Ind., 185.

For the convenience of the court, we append a copy of the decision of the court below in *Marine Ins. Co. v. St. Louis R. Co.* taken from the report of the case in *41 Fed. R., 643*

The case we believe was in all respects similar to that now under consideration, except that in that case the policies of insurance were executed in the State of New York.

Respectfully,

U. M. ROSE,
E. W. KIMBALL,
G. B. ROSE,
For Defendants in Error.

APPENDIX.

MARINE INSURANCE CO. v. ST. LOUIS, I. M. AND S. RY. CO.

(*Circuit Court, E. D. Arkansas.* February 10, 1890.)

1. INSURANCE—SUBROGATION—PARTIES.

Mansf. Dig. Ark., sec. 4934, providing that, "where the assignment of a thing in action is not authorized by statute, the assignor must be a party, as plaintiff or defendant," has no application to an action by an insurance company which has paid the loss against the wrong-doer occasioning the loss, as it does not sue as assignee, but by right of subrogation, and the insured need not be joined.

2. SAME.

Under Mansf. Dig. Ark., sec. 4933, providing that "every action must be prosecuted in the name of the real party in interest," an insurance company which has paid the insured the full value of his goods destroyed may maintain an action in its own name against the wrong-doer causing the loss.

3. MUNICIPAL CORPORATIONS—LEASE OF STREETS.

An attempted lease by a city council of a portion of a street for a private use is void, though owing to its declivity, and its termination upon a river, it was seldom used, except by footmen.

4. NUISANCE—ACCUMULATION OF COMBUSTIBLE MATERIAL IN STREET.

The accumulation of a large number of bales of cotton on a public street, near the business center of the city, in such manner as to obstruct the street, though a passage was left for footmen, by whom it was almost solely used, and to endanger a conflagration by its being fired by passing engines and smokers, is a nuisance.

5. SAME—LIABILITY OF RAILROAD COMPANY.

A railroad company, contracting to remove cotton received by a compressing coompany, from its warehouse where it was received, to its compressing mill, is liable for damages occasioned by a nuisance resulting from the accumulation of the cotton in a public street owing to its failure to remove the same, especially when it had been accustomed to take up the warehouse receipts of the company, and issue bills of lading for the cotton covered thereby, reserving the right to have it compressed, as in the former case it would assist in the creation or continuance of the nuisance, and in the latter would, as a common carrier, permit the accumulation of dangerous material, which it was bound to transport promptly.

named; that the insurance covered the full value of the cotton, which had been paid by the plaintiff to the insured. The defendant demurred to the complaint because the insured, Douglas & Co., and the Howel Cotton Company, were not made parties.

U. M. & G. B. Rose, E. W. Kimball, and *Sanders & Watkins.* for plaintiff.

John M. Moore and *Dodge & Johnson,* for defendant.

CALDWELL, J., (*after stating the facts as above*). Our statute requires that "every action must be prosecuted in the name of the real party in interest." *Mansf. Dig., sec. 4933.* It also provides that, "where the assignment of a thing in action is not authorized by statute, the assignor must be a party, as plaintiff or defendant." *Section 4934.* The latter section has no application to the present case. The complaint does not allege any assignment. The right of the insurance company that has paid a loss to recover of the wrong-doer, after payment of the loss, does not depend upon contract, agreement, stipulation, or privity. *Sheld. Subr., section 1.* The right of subrogation is sometimes spoken of as an "equitable assignment;" but that is only a convenient figure of speech. From the time of the insurance the insurer has a pecuniary interest in the thing insured; and he becomes entitled to a legal remedy whenever he suffers a loss by reason of that interest, and it appears that the loss has been occasioned by the wrongful act of another. Of course, he has no right of action until he has paid the loss to the insured, because until that time he has suffered no damage. In *Deshler v. Dodge, 16 How. 622,* the plaintiff brought replevin for bills that had been assigned to him, and it was held that he was not suing in the character of

assignee. So it has been held that, when a note is made payable to bearer, a transferee thereof does not hold by assignment, and that an executor holding under a will of his testator does not hold as assignee. *Bushnell v. Kennedy, 9 Wall., 387,* and cases cited. In *Insurance Co. v. Insurance Co., 129 U. S., 462, 9 Sup. Ct. Rep., 469,* the court say:

"From the very nature of the contract of insurance, as a contract of indemnity, the insurer, upon paying to the assured the amount of a loss, total or partial, of the goods insured, becomes, without any formal assignment or any express stipulation to that effect in the policy, subrogated in a corresponding amount to the assured's rights of action against the carrier, or other person responsible for the loss, and in a court of admiralty may assert in his own name that right of the shipper."

In respect of parties plaintiff, the first section of our civil code above cited renders our practice similar to that prevailing in the admiralty courts. It has been held under its provisions that the holder of a promissory note payable to order might sue on it without joining the payee, though the latter had never indorsed it. *Heartman v. Franks, 36 Ark., 504.* And it is held that, under the reformed codes of procedure, the action of the insurance company, in cases of this sort, may be brought in the name of the insurer. *Sheld. Subr., sec. 230; Swarthout v. Railway Co., 49 Wis., 625, 6 N. W. Rep., 314; Insurance Co. v. Railway Co. 73 N. Y., 405.* Where the value of the property destroyed exceeds the insurance money paid, the then suit must be brought in the name of the insured (*Insurance Co. v. Railroad Co., 3 Dill., 1;*) though doubtless, under our system of practice, the insurer might be joined where the joinder would not oust the jurisdiction of the court (*Crandall v. Transportation Co., 16 Fed. Rep., 75.*) But, as it is alleged in the complaint in this cause that the plaintiff has paid the insured the full value of the property destroyed, it is plain that

the latter have no interest in the present controversy, and hence that they are not necessary parties.

That the plaintiff is suing in its own right, and not as assignee of the insured, although its title may be in some sense derivative through them, is a proposition that is made equally obvious by the decision in *Railroad Co. v. Dow, 120 U. S., 287, 7 Sup. Ct. Rep., 482.* In that case Dow and others, acting as trustees under a mortgage, had expended money in taking up a prior mortgage, given to secure a debt bearing the conventional rate of interest of 10 per cent. per annum, the legal rate being 6 per cent. per annum. The trustees brought suit, claiming that they were entitled to enforce the prior mortgage, and that, standing in the shoes of the mortgagee, they should be allowed interest on the debt secured by the mortgage at the conventional rate; but the court refused to entertain this view, and held that after payment the trustees could claim no more than 6 per centum per annum. The court said: "The right of subrogation is not founded on contract. It is a creature of equity, is enforced solely for the purpose of accomplishing the ends of substantial justice, and is independent of any contractual relations between the parties." And in *Johnson v. Barrett, 117 Ind., 551, 19 N. E. Rep., 199,* the court say: "Subrogation is the substitution of another person in place of a creditor, so that the person substituted will succeed to all the rights of the creditor, having reference to the debt due him. It is independent of any merely contractual relations between the parties to be affected by it, and is broad enough to include every instance in which one party is required to pay a debt for which another is primarily answerable." The demurrer was overruled.

The defendant then filed an answer, admitting the contract between it and the Union Compress Company; but it denied that it had made the cotton sheds in Little Rock a receiving station for the shipment of cotton; asserted that the cotton in the sheds was solely in the possession and under the control of the Compress Company; denied that it ever induced shippers to deliver cotton at the sheds, or that it ever permitted cotton unreasonably to accumulate at that place; denied that it had participated in the creation of a public nuisance in the street; denied all carelessness; and asserted that the insured were stockholders and officers of the Compress Company, and that by storing the cotton in the sheds they had contributed to the loss thereof. The defendant pleaded further that the plaintiff was a foreign corporation, doing business in the State of Arkansas, and that at the time of the issue of the policies it had never complied with the requirements of a statute of that State mentioned in the opinion of the court.

The cause was tried before a jury, when the following facts appeared in evidence: The cotton sheds referred to were located on the corner of Main and Water streets, in Little Rock, two streets that cross each other at right angles; the latter street running parallel with the Arkansas River, which was near by. At that point Main street approaches the river by a steep descent, and is therefore rarely used, except by footmen, by whom it was much used, mainly in going across Water street to a club-house built near the river, and for the purpose of crossing the river on several skiff ferries that landed at the foot of Main street. On Water street the defendant operated its railroad, which had a switch made for the purpose of receiving cotton from a platform built in front of the cotton sheds

by the Compress Company. By the terms of the agreement between the Compress Company and the defendant, made early in September, 1887, the defendant was to take cotton in common bales delivered at the sheds to Argenta for compression, for the price of two dollars a car; and, as common carriers preferred to have the cotton compressed for the convenience of transportation, it was agreed that the Compress Company should load the cotton on cars to be provided by the defendant in Little Rock, whence it was to be carried to the compress in Argenta, and there compressed by it, and reloaded on cars for further shipment to any point to which it might be consigned; the Compress Company insuring the cotton from loss by fire while it might be lying at the sheds, and subsequently, until reloaded on the cars after compression, for the benefit of the defendant, all for the price of 13 cents for each hundred pounds of cotton. The Memphis and Little Rock Railroad Company also had a like arrangement with the Compress Company, but it had no access to the sheds in Little Rock, and could only get the cotton to be shipped by its line by a side track running by the compress building, in Argenta. The custom of doing this business was of some years' standing, and had its origin in a like agreement between the Little Rock Oil and Compress Company and the defendant. The Union Compress Company was organized in June, 1887, and succeeded to the property and business of the former company; and at the beginning of the cotton season of that year it renewed and continued the agreement that previously had been acted upon. The customary manner of doing the business was as follows: Any shipper in Little Rock, having cotton to ship to any point in the United States or Europe, would

take it to the cotton-sheds, and thereupon the Compress Company would give him a receipt for the same, in the form of a printed warehouse receipt. This the shipper would take to the office of the defendant, or to that of the Memphis and Little Rock Railroad Company, which would take up the receipt, and would give to him a bill of lading for the transportation of the cotton to its final destination in Europe or America, reserving in the bill of lading the right to compress the cotton so received. Upon this the Railway Company notified the shipment to the Compress Company, which at once insured the cotton for the benefit of the Railway Company, as above stated.

It appeared that very large quantities of cotton were thus received by the Compress Company during the three months immediately preceding the fire. The evidence showed that the defendants had not furnished cars to remove the cotton thus deposited; that the place where it was deposited was near the business center of the city; that the Compress Company exercised control over its sheds and grounds in Little Rock; but that at the compress in Argenta there was a shipping clerk, whose salary was paid by the Compress Company and the defendant jointly. At the time of the fire the cotton had accumulated at the sheds until there were from 3600 to 4000 bales at that place. The sheds had been filled to overflowing, until a lower story on Water street, not intended for the storage of cotton, had been filled, after which cotton was placed outside, on the platform utilized in loading it on cars, and then it had been piled across Main street, which was shown to be a public street, leaving only a narrow way for footmen to pass, as above stated. At the time of the fire there were thus deposited 1463

bales of cotton for which bills of lading had been given by the defendant, and 1211 bales for which the Memphis and Little Rock Railroad Company had given bills of lading. The rest of the cotton, including that to which this suit directly relates, was unbilled. There was evidence to show that it was the custom of shippers to deposit cotton of a grade required until the proper number of bales of that grade could be gathered together, when it would be shipped under one bill of lading. Further, that the cotton of Douglas & Co. and the Howel Cotton Company was thus deposited, waiting an opportunity to make corresponding additions preparatory to shipment. It also appeared that, owing to the block of cotton at the sheds in October and November, the Compress Company had objected to the depositing of cotton at the sheds, unless for the purpose of immediate shipment; but that it had never actually refused to receive any cotton brought to its sheds, and that defendant had continued to give bills of lading for all cotton which was offered for shipment, down to and including the day of the fire. It also appeared that Douglas & Co. and the Howel Cotton Company were fully aware of all the facts above stated at the time the insurance was taken, and one or more members of each firm owned stock in the Compress Company; and that the cotton insured by them would have been included in bills of lading within a day or two, if the fire had not occurred. Of all the cotton shipped from Little Rock during the cotton season of 1887, being about 35,000 bales previous to the fire, only about fifty bales, as it appeared, had been shipped from any other point save the cotton sheds of the Compress Company, and some 500 to 1000 bales that had been hauled to the depot of the Memphis and Little Rock Railroad Company in Little

Rock, on account of the block of cotton at the sheds at the foot of Main street. At the time of the fire the accumulation of cotton at the sheds had been going on for five or six weeks, and some of the cotton that was burned had been entered on bills of lading as much as five weeks before the fire. It was shown that at the time the weather was unusually dry; that, while other persons having cotton near the railway sprinkled it after the passage of each train, nothing was done to protect the cotton in and near the sheds at the foot of Main street, except that a watchman was kept to look after it. Persons smoking pipes, cigars and cigarettes passed at will along the passage on Main street, between the cotton bales, and the cotton had been previously fired more than once by accident, and the fire had been put out. It was shown that the officers of the Compress Company, during the time that the cotton was there accumulating, made repeated demands on the defendant for cars to remove the cotton, but that none were furnished.

The defendant introduced testimony to prove that during the autumn of 1887 there was a large and unexpected increase of freight for its road, growing out of an unexpected increase in the manufacture of lumber and the early maturing of the cotton crop, so that it was impossible to procure cars to meet the demand thus made; but the car-service agent of the defendant, being one of its witnesses, testified that in 1887 there were plenty of cars at Little Rock to have removed the cotton, and that he did not know why it was not removed. The defendant offered to prove that the City Council of Little Rock had leased the ground in Main street, at the foot thereof, to the Little Rock Oil and Compress Company for the storage of cotton, and that it had succeeded to its

rights. This was objected to, because the Council had no right to lease a public street for private uses, and because the lease provided that it should not be assigned without the Council's consent, which was not shown. The plaintiff read an ordinance of the city forbidding, under a penalty, the storage of goods or commodities on the streets, and a proclamation of the Mayor of the city, issued in September of 1887, calling attention to the illegality and danger of storing cotton in the streets. The evidence also showed that the bales of cotton in the street had been, for the most part, if not all, cut open for the purpose of sampling them, and that holes were thus left in the bales where the cotton was exposed; also that the baling covering the bales was made of cloth of a very inflammable character. The fire originated in or near the narrow passage between the bales on Main street, and was kindled by a match in the hands of a boy, who was passing, and who was smoking a cigarette. The fire destroyed all the property above mentioned, and much other valuable property, real and personal.

CALDWELL, J. As the questions involved in this case have been extensively discussed, and the case itself presents some novel features, I think it proper to state my conclusions of law upon the evidence adduced. As to the more material questions of fact, there is hardly a conflict in the testimony.

I have had no difficulty in excluding the lease from the City Council. To say nothing about the clause against assignment of the lease, it was plainly *ultra vires*, and void. The streets of the city do not belong to the Council, but to the public—and by that I mean the public at large, and not merely the inhabitants of the city—and to their use they are forever dedi-

cated. The city charter makes it the duty of the City Council to keep them open and free from nuisance. It provides that "the City Council shall have the care, supervision, and control of all the public highways, bridges, streets, alleys, public squares, and commons within the city; and shall cause the same to be kept open and in repair, and free from nuisance." *See Manf. Dig., 737.* The only legal effect of the lease, it would seem, is to render the city liable for the damages resulting from such a licensed nuisance. *Cleveland v. King, 132 U. S., 295, 10 Sup. Ct. Rep., 90.* It makes no difference that, owing to the declivity at the foot of Main street, the street at that point was not commonly frequented by vehicles. The requirements of the public as to property set aside for its perpetual use was not a matter to be passed on by the Council; and it is plain that, by the establishment of a ferry or the building of a bridge at that point, it might at any time become one of the most frequented of all the thoroughfares of the city, the expansion and amelioration of which cannot be hindered by leases of the streets by the City Council. The law is well settled, as it ought to be, that all such leases are void. *2 Dill. Mun. Corp., section 660; McDonald v. Mayor (N. J.) 7 Atl. Rep., 855; Harrisburg's Appeal (Pa.), 10 Atl. Rep., 787; Gas Co. v. Teel, 20 Ind., 131.*

The Union Compress Company and the defendant had the same right to use Main street that others had; no greater, and no less. Cotton or commodities of any kind may be lawfully placed in the street for immediate transportation; but no one can have the right to appropriate any part of a street to a private use. The city ordinance that was read only gives emphasis to what was the law before it was passed, and what would

remain the law if it were repealed. The storage of goods or impediments of any kind on the street for an unreasonable time is an act that constitutes a nuisance. *Patterson v. Railroad Co., 56 Mich., 172; 22 N. W. Rep., 260; Henry v. Dennis, 93 Ind. 452; 47 Amer. Rep., 378; Maddox v. Cunningham, 68 Ga., 431; Turner v. Holtzman, 54 Md., 148; Wendell v. Mayor, 39 Barb., 336; Callaman v. Gilman, 107 N. Y., 360; 14 N. E. Rep., 264.* And one who thus encroaches on a street for an unreasonable length of time is guilty of creating and maintaining a nuisance, whether the encroachment materially interferes with the use of the street or not. "The right to pass and repass upon a public highway is not restricted to any part; for 'the public are entitled not only to a free passage along the highway, but to a free passage along any portion of it not in the actual use of some other traveler.' *1 Hawk, P. C., c., 32, sec. 11.*" *State v. Berdetta, 73 Ind., 185; 38 Amer. Rep., 117,* and note. In this case there was not only an obstruction of the street, but the obstruction was caused by many thousands of bales of cotton, a very combustible material, contiguous to the business center of the city. It was created and continued for several weeks through a very dry season, when the cotton was in danger of being fired by the sparks of passing locomotives, by persons smoking in the street, and by other means. Considering the fact that it would be next to impossible to extinguish a fire originating in this accumulation of combustible material until the whole of it should be consumed, and that the fire thus kindled would probably be communicated indefinitely to buildings and property throughout the city, involving not only great pecuniary loss, but probably loss of life as well, it is impossible to say that this aggregation

of cotton thus placed was not a nuisance of a very alarming nature. What did happen—the burning of the cotton, with much valuable adjacent property—was just what might have been reasonably apprehended, and what it seems was apprehended, by the officers of the Compress Company.

It is not necessary to say that the defendant was the sole party in fault in the matter; for whoever aids or assists in creating, maintaining or continuing a nuisance is responsible for any loss or damage that may be caused thereby. What was called the "cotton shed" of the Compress Company, at the foot of Main street, was simply a large brick building, covered with a gravel roof, two stories in height, the upper story being intended for the storage of cotton, having an incline by which bales of cotton were rolled down to the lower story for compression by the machinery which had been formerly operated in the lower story, but which had been removed some months before the opening of the cotton season of 1887. This lower story, not intended for the storage of cotton, was covered in front with iron, with several doors opening on the platform which formed a connection with the cars of the defendant on its side track, whenever they were placed there for the purpose of receiving it. As the cotton was not removed by the defendant as it came in, the upper story became filled, and new accessions of bales were placed in the lower story, until that was filled; whereupon cotton newly arrived was placed along the platform outside and on the street, until it covered the entire street for a considerable distance, except the narrow passage-way for pedestrians. Witnesses testify that if the cotton had been removed as it came in, the Compress Company would have had room for the convenient storage of all cotton

that was left there temporarily for the making up of lots for shipment. That the defendant is responsible for the state of things that resulted in the fire, causing the loss for which the plaintiff sues, I have no doubt. If it had removed the cotton as it was received, the cotton in the sheds would have been reasonably safe—as safe as cotton deposited in other sheds in the city. This is not a suit upon the contract between the Compress Company and the defendant; but the action is based on the assumption that the defendant contributed to the creation and continuance of the nuisance. If A should make a contract with B, by which the latter should contract to deliver to him in front of his premises in the street a certain quantity of gunpowder, agreeing that he would remove it to a place of security, or to a place less dangerous, and he should not remove it after delivery, but should suffer it to remain in the street until it exploded, to the injury of a third person, he could hardly be heard to say that the nuisance was created by B, and not by himself. One may become responsible for aiding in the creation of a nuisance either by action, or by neglecting to act. It is not necessary to weigh the comparative responsibility of the defendant and the Compress Company. The latter might have broken off its contract with the defendant, and have refused to receive cotton after the breach of the contract became apparent, but I do not think that it lies in the mouth of the defendant to say that it ought to have done so; and it seems to me that the prime fault was in the defendant in not removing the cotton as it had agreed to do, and promptly, as the exigency of the case demanded. At any rate, by its participation in the illegal acts complained of, it became liable for any loss that might occur, without regard to

any question of liability on the part of the Compress Company.

Where the negligence of two or more persons contributes to occasion a loss to a third person they are both liable for the damage sustained. *Slater v. Mersereau, 64 N. Y., 138.* So where a landlord has a sidewalk that is out of repair, and he leases it with a covenant on the part of the tenant to keep in repair, and after that one is injured by reason of the defect in the sidewalk, the landlord and the tenant are both liable for the injury. *Davenport v. Ruckman, 37 N. Y., 568.* Where an injury is the result of two concurring causes, the party responsible for one of these causes is not exempt from liability, because the person who is responsible for the other cause may be equally culpable. *Lake v. Milliken, 62 Me., 240; Barrett v. Railway Co., 45 N. Y., 628; Pretty v. Bickmore, 6 Moak, Eng. R., 182.* If we might say that the nuisance was created by the Compress Company, it would nevertheless be true that the defendant would be liable for the loss arising from the conflagration, since it is true that any one that continues a nuisance is as guilty as he that creates it. *Wasmer v. Railroad Co., 80 N. Y., 212; Brown v. Railroad Co., 12 N. Y., 487.* Those who create or continue a nuisance in a street are bound, at their peril, to keep the street as safe as if the nuisance was not there. *Irvin v. Wood, 4 Rob. (N. Y.), 142; Wendell v. Mayor, 39 Barb., 336; Anderson v. Dickie, 26 How. Pr., 117; Congreve v. Morgan, 18 N. Y., 84; Bizzell v. Booker, 16 Ark., 308; Bonnell v. Smith, 53 Iowa, 282; 5 N. W. Rep., 128.* One who creates a nuisance or who continues it, is liable for any damage caused thereby, though the immediate cause may have been the negligence of another person. *Meyers v. Mal-*

colm, 6 Hill, 292; Wood Nuis., sec. 142; McAndrews v. Collerd, 42 N. J. Law, 189.

The liability of the defendant may, however, be placed on a distinct ground equally secure. The denial in the answer that the defendant did not make the cotton sheds one of its receiving stations is overturned by all the evidence in the case. Practically, all the cotton that was shipped from Little Rock in the autumn of 1887, prior to the fire, was shipped there. It will not avail the defendant to say that the cotton at the sheds was in the exclusive control of the Compress Company. As for the 1463 bales for which it had issued its bills of lading, they are by law conclusively presumed to have been in its possession (*Acts Ark., 1887, p. 84*); and as to the 1211 bales for which bills of lading had been issued by the Memphis and Little Rock Railroad Company, they were held by the Compress Company subject to its orders, and as its agent. Without these the remaining cotton, embracing that for the value of which this suit is brought, could not have been destroyed in the way in which it was destroyed. Now, a railroad company which allows explosive or combustible materials to accumulate at a station until they become a nuisance, must necessarily become liable for any injury sustained by reason thereof. *Railroad Co. v. Conway, 8 Colo., 1, 5 Pac. Rep., 142; Scott v. Hunter, 46 Pa. St., 192; Wood Nuis., sec. 142; Lake v. Milliken, 62 Me., 240; Bradley v. People, 56 Barb., 72.*

The plea of contributory negligence is not sustained. The delivery of the cotton at the sheds by the insured was in no sense a proximate cause of the loss: and no act of negligence on the part of the plaintiff that is not a proximate cause of the injury complained of can be considered in the

light of contributory negligence, such as will bar a right of action. *Beach Contrib. Neg., sec. 10.* Moreover, the defendant gave bills of lading for all cotton that was offered to it for shipment, down to the very day of the fire; and it cannot now be heard to say that it was the fault of anyone to trust it to perform its duty, because it had shown itself to be untrustworthy in the past. Immunity from liability is not to be secured by a train of misconduct, however long continued.

A few cases illustrative of this principle may be mentioned. A tenant rented certain lands for 1877, knowing that a railroad company maintained a nuisance thereon in the shape of a pond of water, which affected the health of his family. With this knowledge he rented the place for the year 1878, when it became more sickly, so much so that he was unable to gather his crops; and he brought an action against the Railroad Company, and it was held that the tenant could presume that the latter would abate the nuisance; that the law did not require him to remove, but did require the company to abate the nuisance. *Railroad Co. v. English, 73 Ga., 366.* The law will not hold it imprudent in a person to act upon the presumption that another will act in accordance with the rights and duties of both, even though he may have formerly conducted himself in a contrary manner. *Newson v. Railroad Co., 29 N. Y., 383.* The subject is discussed in *Kellogg v. Railroad Co., 26 Wis., 223; Fraler v. Water Co., 12 Cal., 555; Bowas v. Tow-Line, 2 Sawy., 27.* See, also, *Beach, Contrib. Neg., secs. 10, 13, 18, 23; Damour v. Lyons City, 44 Iowa, 276.* Moreover, if it were held to be negligence on the part of the insured and others to deposit their cotton in the sheds, knowing that the defendant had failed to remove other cotton

promptly, as its duty required, still if the defendant, its officers and agents, knew of the negligence of the persons thus depositing their cotton, as the evidence shows that they did, it was their duty to avert the consequence of their negligent acts; and the defendant could not evade responsibility for a failure to do so. *Railroad Co. v. Freeman, 36 Ark., 46.*

The claim that the defendant is to be excused because, owing to an unexpected press of business, it had not cars sufficient to remove the accumulating cotton, is not good in law, nor is it sustained by the evidence. A railway company may rightfully decline to receive freight offered when it has not necessary rolling stock and equipments to carry it without delay, but if it receives goods for transportation it is held to a compliance with its contract to transport them without unreasonable delay. *Bussey v. Railroad Co., 13 Fed. Rep., 330.* But while the evidence tends to show a lack of cars belonging to the defendant, or under its control, for moving the freight on its lines in this State generally, the evidence of the principal witness for the defendant on this point, Mr. Hequemberg, is that only fifteen or twenty cars were needed for transferring the cotton across the river, and that there were plenty of cars at Little Rock in 1887 to have removed every bale of it.

Another defense relied on is that the plaintiff is a foreign corporation that had not complied with the laws of this State at the time of the issue of its policies. This defense is based on the act approved April 4, 1887 (*Acts Ark. 1887, p. 234*), which provides "that, before any foreign corporation shall carry on any business in this State," it shall file a certificate in the office of the Secretary of State, designating an agent, a citi-

zen of this State, upon whom service of process may be made, and that in default thereof the contracts of such foreign corporations with citizens of this State shall be void. There is no force, however, in this defense, since the evidence shows that the contracts of insurance were made in the State of New York, and that the policies were issued in that State. As was said by Gresham, J., in *Lamb v. Bowser, 7 Biss., 315*, it is hardly competent for the Legislature of this State "to declare that the citizens of this State shall not be allowed to make such contracts as they please out of the State, for the insurance of their property, whether it be within or without the State." Certainly it was not the intention of the Legislature to go so far; and the court so held in that case, where the statute was the same, in substance, as our own. Certainly the issuing of a policy in New York, on property here, cannot be considered as the carrying on of business in this State, within the intent and meaning of the statute in question. It is at least doubtful whether the defendant could successfully interpose the defense, even if the issuing of the policies was within the purview of the statute. In the case of *The Manistee, 5 Biss., 384*, the court said:

> "If the owner of the cargo had not taken a policy from the agent of this company, but had shipped without insurance, he would be entitled to recover of the carrier, for the loss, the value of the cargo. In my opinion, the carrier should not be permitted to make this defense. The shipper might have brought a libel for the use of the company, and, if the use were not expressed in the record, the court would protect the company, even after a decree in favor of the libelant."

There is another ground upon which the defense must fail. The Legislature of this State, in reference to insurance, has always formed a distinct title by itself, and has not been in any

way blended with enactments referring to corporations generally. It may be said to form something like a separate code, which has been added to from time to time, as circumstances required. By an act approved April 25, 1873, it was provided, in effect, that no foreign insurance company should do business in this State without first filing with the Auditor a stipulation agreeing that any process served on the Auditor, or an agent, to be designated by the company, should have the same effect as if served on the company; and that if any such company should cease to maintain an agent in this State, such process might thereafter be served on the Auditor. *Mans. Dig., sec. 3834.* This statute accomplishes for foreign insurance companies the same results that are sought to be obtained as to other foreign corporations by the later act. It has been in force for a good many years, and has been found satisfactory. The act of 1887 contains no repealing clause; and as these two statutes are not inconsistent, and implied repeals are not favored, I think that they are both in force, and that the statute of 1887 has no application to insurance companies.

Entertaining these views upon the questions of law that have been raised and discussed, I shall therefore charge the jury as follows: The complaint charges that the defendant and the Union Compress Company, by an agreement between themselves and by a general course of business, made the cotton sheds of the Compress Company at the foot of Main street a receiving station for cotton to be sent from this city by any one to the compress of said Union Compress Company in Argenta for compression; and that the defendant should transport all cotton thus received; and that the defendant failed to transport the cotton thus received promptly; but suffered

it to accumulate at said cotton sheds, and in Main street, a public highway of the city, until it became a public nuisance, and was set on fire in Main street; and that by reason of said fire the cotton insured by it, mentioned in the complaint, was destroyed. The agreement mentioned in the complaint, between ihe Union Compress Company and the defendant, is admitted in the answer; and it is also admitted that the cotton did accumulate in said cotton sheds, and at the foot of Main street, and that it was fired in said street. But the defendant alleges that it is not responsible for the loss of the cotton mentioned in the complaint, because, owing to an unexpected demand on it for cars for the transportation of freight in the months of September, October and November, 1887, it could not furnish the means of transportation of the cotton received at said cotton sheds promptly, according to its agreement. The court now instructs you that by said agreement it was the duty of said defendant to transport the cotton thus received at said cotton sheds for shipment, promptly to Argenta; and that if defendant failed to do so, and by reason of the continued reception of cotton at said sheds, and the continued giving of bills of lading therefor, as often as demanded by shippers, down to the day of the fire, cotton was suffered to accumulate in said sheds, and on Main street, until it endangered the property of others in the immediate vicinity; and that mentioned in the complaint, then said defendant was guilty of aiding in the creation and maintenance of a public nuisance, and is liable for the loss mentioned in the complaint, and its defense that it was hindered from transporting said cotton from the foot of Main street, by reason of an unexpected pressure of business, is not sustained by the evidence. The defendant has pleaded